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ENQUIRIES AND HOW TO RESPOND TO THEM

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Richard Snape

www.LawSureInsurance.co.uk

TEL: **0345 557 0845**
EMAIL: enquiries@lawsure.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

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MISREPRESENTATION GENERALLY

Misrepresentation is a false statement of fact which at least in part induces another to enter into a contract. Silence, save in exceptional circumstances, such as insurance contracts, will not constitute a misrepresentation but a half-truth will. See e.g. ***Nottingham Patent Brick Company v Butler [1886] 16 QBD 778*** where a solicitor stated that he was not aware of any restrictive covenants not having attempted to find out.

If circumstances change, there will be a duty to notify parties of the change without request. See e.g. ***With v O'Flanagan [1936] Ch 575*** where a dental practice had been profitable was no longer so by the time of sale. A genuine statement of law or opinion as opposed to fact will not be a misrepresentation but the opinion must be genuinely held. See e.g. ***Bisset v Wilkinson [1927]*** A***C 177*** where an opinion as to the sheep holding capacity of a farm was made. The seller had no previous experience of sheep farming and this was held to be a statement of opinion. Contrast ***Smith v Land and House Property Company [1884] 28 ChD 7*** where a tenant was described as being most desirable even though he was one quarter in arrears of rent. This constituted a misrepresentation. More recently, see ***McMeekin v Long [2003] 29 EG 120*** where an enquiry about neighbour disputes was answered by the word "none". In fact there had been a ongoing parking dispute. This was actionable. If the buyer has the opportunity to discover the truth, this does not prevent a misrepresentation; see ***Redgrave v Hurd (1881) 20 Ch 1.***

Negligent Misstatements

As well as inducing a contract a negligent misstatement may give rise to liability in tort and a claim may be made by anyone who reasonably relies on the statement.

Normally, liability in tort only arises for physical loss or financial injury which is associated with such loss. There will be no claim for pure economic loss. See e.g. ***Murphy v Brentwood District Council [1991] UKHL 2*** where a local authority negligently failed to check plans and an architect negligently designed a property with infill. A subsequent purchaser who did not have a contract with either and where the builder had become insolvent could not claim as the only loss suffered was economic, i.e. he had a less valuable building. See also ***Department of Environment v Thomas Bates [1991]*** where a building could not achieve its design load. The architect could not be sued as once more the loss was merely economic. For this reason collateral contracts may be desirable between purchaser and design team.

The exception to the above is where the loss is caused by a negligent misstatement. See, e.g. ***Hedley Byrne v Heller [1964] AC 465*** where negligent references were held to be actionable. If someone holds themselves out as having specialist knowledge such that is reasonable to expect others to rely on that representation, and they do so rely and loss is caused, there will be a claim available. This will usually occur in the course of a business but see, e.g. ***Chaudrey v Prabhakar [1987]*** where a friend of the claimants held themselves out as being an expert in cars and purchased an insurance write-off for the claimant. This was actionable.

There must also be a degree of proximity in that it must be reasonable for the claimant to rely on the representation. See, e.g. ***Caparro v Dickman [1990] 2 AC 605*** where yearly accounts were relied on during the course of a takeover. There was no claim here. Contrast ***Morgan Crucible v Hill Samuel [1989]*** where accounts were produced when there was already an identifiable bidder for the business.

ENQUIRIES GENERALLY

Clinicare Limited v Orchard Homes [2004] EWHC 1694

In response to an enquiry about dry rot, the client replied that he was not aware of any but that the buyer should rely on their own inspection or survey. The buyer then arranged for a survey which revealed major problems in relation to damp, advised that this might have given rise to dry rot and that a further survey was therefore recommended. The buyer went ahead without having had a further survey. The dry rot was subsequently discovered and the sellers were successfully sued.

The court held that knowingly failing to disclose the existence of the dry rot, presumably on instruction from the client, amounted to an actionable misrepresentation. The burden cannot merely be passed on to the buyer and their solicitor by stating that they must rely on their own survey or, presumably, on their own skill and judgment. Where to draw the line is very unclear and this decision may present major difficulties for both solicitors and surveyors and, indeed, their clients. The only thing which may not be construed as a misrepresentation is silence and the buyer's solicitor might not accept this. An impasse between the parties will soon be reached. Furthermore, what does a solicitor do if a seller requires him not to disclose the existence of dry rot, for instance? Will he have to refuse to act as otherwise he may be faced with a conflict of interest? In following instructions the solicitor may be opening himself to a damages claim. There is, finally, less incentive for the buyer to employ his or her own specialists in the knowledge that they might have a cause of action against the seller in any case. This is indeed regrettable.

The case is based on ***Sindall v Cambridgeshire County Council [1994] 1 WLR 1016*** whereby a local authority selling land for development was asked questions about any property rights affecting the land which could not be seen on inspection and replied that they were not aware of any. If they had looked at their records they would have found that drains have been laid under the land some 60 years previously. This might have been a misrepresentation. However, the Court of Appeal held that the seller had taken all reasonable steps.

Rosser v Pacifico Limited [2023] EWHC 1018 The case concerned an apartment which was sold as having two bedrooms. The seller responded to 4.4 of the TA6 enquiries by stating that they were not aware of any breaches of planning permission. The property was in a conservation area and one of the rooms had a Velux window overlooking the highway. This constituted a breach of planning permission and the local authority required its removal. The consequence of this was that the room did not constitute a bedroom under building regulations. The court followed the case of ***Sindall v Cambridgeshire County Council (1993)*** and held that 'not aware' was a representation that reasonable steps had been taken to find out. Moreover, the buyer's conveyancer was under no obligation to find out about breaches. The seller was sued for the difference in value between a one bedroom and a two bedroom flat together with additional stamp duty land tax and the cost of removing their window.

In ***Morgan v Pooley [2010] EWHC 2447*** it was recognised that this liability could be excluded by special condition.

See also ***Morris v Jones [2002] EWCA 1790*** - here a response to an enquiry about damp stated that other than work carried on by a guarantee there was none to the vendor's knowledge but the buyer should rely on his own survey. The survey found damp but the seller was still liable as he failed to disclose more severe damp which was in his knowledge.

In ***McMeekin v Long [2008]*** a misrepresentation occurred when neighbour a dispute was not disclosed on request damages were assessed at £67,000.

In the American case of ***Stambovsky v Ackley (1991)***, a seller was held to be liable in misrepresentation when they responded to an enquiry about hauntings that they were not aware of any. In fact, they had recently written an article in the Readers Digest about the haunted house.

More importantly, in ***Sykes v Taylor-Rose [2004] EWCA 296*** the standard enquiry of the time as to whether there were any other factors which might influence the purchaser's decision was answered in the negative. To the seller's knowledge there had been a murder committed in the premises previously which they did not disclose. It was held as the question is subjective and it could not be proven that the seller's thought this important, there was no liability.

In ***Doe v Skegg [2006] EWHC 3746*** the client stated they were not in dispute with their neighbours when they had made recent complaints about them. This was held to be a fraudulent misrepresentation.

Thorp v Abbotts [2015] EWHC 2142, a couple agreed to purchase a house for £625,000. The seller completed the 2007 edition of the TA6 which had the question:

3.1 Has the seller either sent or received any communication or notices which in any way affect the property, for example from or to neighbours, the council or a government department?

3.2 Has the seller had any negotiations or discussions with any neighbour, local or other authority affecting the property in any way?

Soon after completion the purchaser became aware of planning applications made a month after completion for 740 dwellings in the nearby green belt. Some months later another application was made for 800 houses in the flood plain nearby. Planning permission was eventually granted.

The purchaser sued the seller for misrepresentation. It transpired that the seller had been aware of the possible planning applications and had attended meetings in which they were discussed. At the meeting a planning officer had stated that permission would almost certainly not be granted. It was held that there was no misrepresentation as the seller genuinely believed that there would be no planning permission and therefore that the response was not material. Note that the 4th edition of a TA6 now deals with this issue and a decision may be different.

First Tower Trustees v CDS (Superstores International) Limited [2018] EWCA Civ 1396 here the tenant raised enquiry as to whether there were any breaches of environmental law in the premises. The landlord responded in the negative. Subsequently, just before completion the landlord was served with notices in relation to asbestos on the premises. The landlord did not notify the tenant of the change of circumstance. The tenant was faced with nearly £500,000 worth of remediation work and sued the landlord in misrepresentation. The landlord relied on a non-reliance clause whereby the tenant was deemed was not to have relied on any misrepresentations. Exclusion of liability from misrepresentation must be reasonable under s3 Misrepresentation Act 1967. The non-reliance clause was held to be unreasonable.

The Court of Appeal confirmed this decision.

THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008 AND AMENDMENT REGULATIONS 2014

The original 2008 Regulations introduced criminal offences with a maximum 2 years prison where a trader makes a misleading statement or a misleading omission to a consumer which to a significant degree causes the latter to enter into a transaction. The 2008 Regulations applied to immovable property, however, the Law Society practice note states that this was not the case until 2014.

On 29th February 2016 the Law Society produced a practice guide on the ***Consumer Protection Regulations***. Although the point is unclear they say that the regulations will apply to solicitors acting for sellers or landlords in residential conveyancing. If this is so then much of the principal of caveat emptor will no longer apply as solicitors will have to disclose factors that are reasonably in their knowledge which may significantly influence a purchaser or tenant in entering into the transaction. The guidance also states that the solicitor must take reasonable steps to find out information which may be within their knowledge. To some extent this seems to resurrect the old part 2 of the Sellers Property Information Form. Also, where this leaves solicitors disclaimers in relation to not having looked at previous files is problematic.

Much of the information within the solicitors knowledge may be considered confidential in which case the seller would have to give their consent to disclosure. If such consent is not forthcoming the the solicitor would have to refuse to act.

Note: If this is correct, then presumably the same would apply to the purchaser's solicitor if they were to find out about, e.g. problems in relation to financing.

Note: In February 2017 the Law Society received Counsel's opinion to the effect that their interpretation of the regulations was correct.

THE CONVEYANCING PROTOCOL

This is compulsory for firms who are a part of the CQS. Firms can always agree not to be bound by the protocol and it does not apply to new builds. Some major points are as follows:

This came into force on August 19th 2019 and replaces the 2011 edition.

1. The leasehold information should be expressed clearly to the client and the protocol envisages that the client should be quite clear about the nature of leasehold and in particular any ground rent increases, potentially with worked examples.

2. For SDLT and Land Transaction Tax, clients should be made aware that tax advice has not been given and in more complexed transactions they should be advised to see an independent tax specialist or accountant or a tax lawyer within the firm.

3. Bank account details should not be sent via email and clients should be told about some of the ways in which conveyancing frauds are perpetrated by the fraudsters.

4. Other provisions include that the purchaser should not raise enquiries about identity unless there is a fraud indicator. Stage 3 states that the purchaser's conveyancer should satisfy themselves that the seller's conveyancer will give the undertakings for completion in The Law Society Code for Completion by Post in which case fraud enquiries need not usually be made unless there is a red flag, such as a property being empty for no obvious reason.

5. There is no need to see original certification (e.g. FENSA) if they can be seen on a website or on a search.

6. The seller's solicitor should ensure that the money is paid into a bank account which has been opened for at least a year. This could cause major problems e.g. on an executor sale.

The Protocol and Additional Enquiries

Stage 15 replaces the previous Stage 32 but is similar in content. To quote:

Seller's Solicitors

- Obtain the seller's responses to additional enquiries. Explain that if inappropriate enquiries have been raised, answers need not be given.

- Respond to the additional enquiries from the buyer's conveyancer. You do not have to answer inappropriate enquiries.

- The seller should not be required to supply more information than is available in the documents.

- Inform the seller and the estate agent of any matters likely to delay exchange of contracts.

Buyer's Solicitors

- **Raise only specific additional enquiries** required to clarify issues arising out of the documents submitted, or which are relevant to the title, existing or planned use, nature or location of the property or which the buyer has expressly requested.
- **Do not raise any additional enquiries** about the state and condition of the building unless arising out of your conveyancing search results, your buyer's own enquiries, inspection or their surveyor's report.

- Indiscriminate use of 'standard' additional enquiries may constitute a breach of this Protocol. If such enquiries are submitted, they are not required to be dealt with by the seller/seller's conveyancer.

The seller's conveyancer does not need to obtain the seller's answers to any enquiry seeking opinion rather than fact.

SPECIFIC ENQUIRIES IN THE PROPERTY INFORMATION FORM

Question 2 - Disputes and complaints by neighbouring owners/occupiers

This is one of the questions sellers find difficult to respond to – they are not certain how much detail they ought or need to provide. Noise from neighbours or elsewhere is another related issue that creates difficulties.

Question 4 - Planning matters

A web link is available through the Planning Portal. There is also a web link available in relation to whether conservatories need building regulations. If a conservatory is more than $30m^2$ in area building regulations will be required. Moreover, the conservatory must be detached from the main body of the building for it to not require building regulations. If the conservatory is built within 3m of a private sewer then it will also need to pass H4 of the Building Regulations. If it was built within 3m of a public sewer it may also need a build over agreement from the sewerage company.

Solar Panels

Solar panels have caused some concern. Those that are simply bought and put on the property are one issue but the matter of particular concern to buyers and lenders is where a 20 to 25 year lease of roof space is granted, sometimes without consent of the lender in breach of the mortgage terms and conditions - see later. If those buying a property assume that any solar panels on the property are owned outright by the seller would this issue be sufficiently identified by the previous questions in Form TA6, the entries on the title register and those in the Fittings and Contents Form? Such panels are more likely to be fixtures rather than fittings.

Note: Mortgage companies will require there to be a break clause if they go into possession. The lease is at a peppercorn rent but as the tenant occupied for the purpose of a business section 23 Landlord and Tenant Act 1954 will apply unless the lease was initially contracted out on its creation. See mortgagee part 2 requirements in relation to reporting to the lender.

The enquiries ask whether the property has solar panels and, if so, when they were installed. The installation date will be required to find out the feed in tariff which varies over time. There is also a question as to whether the roof space has been leased out and if so a requirement to provide the lease.

THE TA6 4TH EDITION

A new edition of the TA6 form was introduced on February 7th 2020. The changes are as follows:

- There is a warning in the guidance notes to the TA6 in relation to Japanese Knotweed that the clients have not ticked the 'No' box unless they are certain that there is no Japanese Knotweed, and if unsure they should tick 'Don't Know'.
- It also makes clear that the rhizomes may be underground but not seen and the property may be affected by knotweed if it was within three metres of the boundary. Details of any insurance must also be provided.
- If radon gas is present any test reports must be provided.
- In relation to septic tanks which drain into a watercourse there is an enquiry as to when it was last replaced or upgraded (see later).

On 5 June 2020 the 4th Edition was revised. Section 12.5 now states that if a septic tank drains into a water course it will need to be either connected to the main sewer, replaced by a drainage field or replaced by a small treatment plant. This should be done as soon as is reasonably practicable, e.g. within twelve months.

JAPANESE KNOTWEED

Japanese knotweed is a notifiable substance. It is illegal to cause it to be propagated in the wild under the Wildlife and Countryside Act 1981. The Local Authority can issue remediation notices and charge for its removal. The residential enquiries, TA6 (4th Edition), raise an enquiry as to whether the property is affected by Japanese knotweed. It allows the responses of yes, no or don't know. No would be a statement of fact and potentially actionable. Don't know may be a representation that attempts have been made to investigate. Moreover, the property may be affected by Japanese knotweed if it is within the neighbourhood. It is suggested that responses should make clear that there has been no attempt to find out. The presence of knotweed is also required in response to the CPSE enquiries sections 8 and 15 as it constitutes a contaminated substance and an infestation.

The mortgagee must be told of the existence of knotweed, although valuation reports may pick this up. The mortgage offer may be withdrawn unless the knotweed can be controlled by experts before reaching any building.

Note: Under the Anti-social Behaviour Crime and Policing Act 2014 local authorities may serve community protection notices on property owners who fail to control their knotweed. In 2019 Bristol City Council became the first local authority to prosecute for a breach of a community protection notice. The recipient was fined £18,000.

Williams & Waistell v Network Rail Infrastructure Ltd [2018] EWCA Civ 1514. Here Network Rail Infrastructure Ltd were successfully sued in nuisance for not removing knotweed growing on neighbouring land to dwellings owned by Williams & Waistell. Damages were assessed at £10,000 plus £5,000 towards remedial costs.

The Court of Appeal have now confirmed the first instance decision but on different grounds. Loss of value cannot be claimed as this is pure economic loss. However, damages were available for lost development potential and possible future damage to property.

Davies v Bridgend County Borough Council [2023] EWCA 80. In spite of the above the Court of Appeal held that the ongoing existence of Japanese Knotweed would give rise to a nuisance and damages were available.

Ryb v Conway Consultants, June 2019. In this case a surveyor was successfully sued for not spotting Japanese Knotweed in a residential garden in North London. He should have taken photographs and made a record of the knotweed. The claimant successfully argued that he would not have bought the property or would have wanted a reduced price if he had known. Damages were assessed at £50,000.00.

In ***Downing v Henderson (2023)*** a seller was sued for £32,000 for stating that there was no Knotweed. In this case they seem to have known about the existence of knotweed.

In 2020 a case was settled where the purchaser was suing the seller for 23% of the value of the property.

On 23 March 2022 the RICS produced new guidance on Japanese knotweed. Previously, it was stated that knotweed could be a problem if within 7 metres of a boundary. This has now been reduced to 3 metres. The new guidance also states that save in exceptional circumstances knotweed is unlikely to have an impact on value. Ultimately, however, the decision will be that of the mortgage company.

MANAGEMENT ENQUIRIES

The LPE1 Form

On 10 October 2013 the Law Society together with the British Property Federation, RICS and various other bodies introduced the LPE1 Leasehold Flat Management Enquiries. The hope is that this will lead to standardisation in relation to flat management enquiries and to managing agents charging less money for information. The enquiry forms are extensive and up-to-date and deal with matters below, such as fire safety risk assessments, houses in multiple occupation, service charges consultation and asbestos risk assessments for premises which were built or converted prior to 2001. They are not standard Protocol enquiries and not automatically used by Conveyancing Quality Scheme Members.

On 1st October 2015 the second edition of the LPE1 was produced with some additional enquiries. There is also now an LPE2 Buyers Leasehold Information Summary which is one page providing financial information in relation to cost of notices, deeds of covenant, service charge and ground rent to be provided to the purchaser.

On 22nd November 2021 the 3rd Edition of the LPE1 was produced, primarily to deal with the new Fire Safety Act 2021.

On January 9th 2023 the fourth Edition of the LPE1 was published to deal with the Leaseholder Protections under the Building Safety Act 2022.

The Fire Safety Act 2021

The Act finally received the Royal Assent on 29 April 2021. The Act clarifies the Regulatory Reform (Fire Safety) Order 2005 and makes clear that a fire safety risk assessment where there are at least two sets of dwellings in a building must include the exterior, structure, external doors and windows, internal doors which open into the common parts, balconies and other external fixtures. Non-compliance may result in prosecution of the responsible person, ie. the landlord, and buildings insurance may be vitiated. The House of Commons successfully rejected a House of Lords amendment whereby the cost of the assessment and any works would not be added to service charge.

The Act came into force in Wales on 1 October 2021 and in England 16 May 2022. On 22 November 2021, the LPE 1 forms changed, partly to reflect this.

Note: it is unclear, but the new legislation refers to two sets of domestic premises which seems to imply that buildings without common parts will require a fire safety risk assessment.

On October 1st 2023 S.156 of the Building Safety Act 2022 came into force and amended the Fire Safety Order 2005. It is suggested that enquiry may be made as to whether any fire safety risk assessment complies with the new provisions.

BUILDING SAFETY ACT 2022

Higher-Risk Buildings

In England, Higher-Risk Buildings contains at least two dwellings and are either 18 metres or 7 storeys in height. The Building Safety Regulator will be responsible for building control in such buildings as of October 1st 2023. Such a building will have an accountable person who will be responsible for repair and maintenance of the common parts or will have an interest in possession in the common parts. If there is more than one accountable person then there will be a principal accountable person without an interest with possession in the exterior of the building. It is a criminal offence to allow anyone into residential occupation of a new building unless the accountable person has first seen building control completion certificates. This will include conversions. Existing Higher-Risk Buildings had to be registered with the Regulator between April 6th 2023 and October 1st 2023. Not to do so would be a criminal offence by the principal accountable person. It is suggested that there should be enquiry about these issues.

APPENDIX
SEPTIC TANKS

Septic tanks and treatment plants will always need building regulations. For a new installation then it is expected that the sewer be connected to a public sewer if there is a public sewer within 30 metres.

As of 1 January 2012 in Wales, all tanks must be registered with Natural Resource Wales with an exemption or permit.

In England most domestic tanks will not need to be registered. However, there are three exceptions.

If the tank is within 50 metres of a drinking supply such as a well or borehole; where there is a discharge of more than $2m^3$ a day or where the discharge is within a Zone 1 ground water protection zone. The Environment Agency will advise over the telephone whether the latter is the case. In Wales registration should occur as soon as possible, but the Environment Agency will accept registrations until 30 June 2012. The Welsh Assembly intends to send leaflets to anyone with a septic tank. In England and Wales the cost of a discharge permit is temporarily set at £125.

Note: Regardless of registration, maintenance records should be kept in relation to the tank and TA6 Enquiries ask for these to be provided to the buyer.

Note: That implementation of these provisions in England was put on hold in August 2011. However, they came into force in Wales on 1 January 2012.

On 9th October 2014 the Environment Agency announced results of their consultation and draft regulations will be produced for implementation on 1st January 2015. As of 1st January 2015 large septic tanks discharging more than $2m^3$ of waste a day will need to be registered with a discharge permit costing £125. Small tanks will not need to be registered with an exemption but will need a discharge permit if in a zone 1 water protection zone area or within 50m of a drinking supply or if the discharge is above the low water mark. Tanks in areas of outstanding natural beauty will now not need to be registered. None registration is a criminal offence although the Environment Agency intend to be lenient and educate property owners rather than prosecute.

The provisions came into force in England on 1st January 2015. New tanks in designated areas will need to be registered and obtain a permit but not existing tanks. The number of designated areas has been reduced. Larger tanks will still require a permit.

The above provisions are contained in the General Binding Rules. In addition, if a septic tank flows into a water course as opposed to a drainage field, this must be replaced on a sale of the property and by January 2020 at the latest. A treatment plant will not need to be replaced.

On November 8th 2019 the Environment Agency produced new guidance. This is nearly the same as previous guidance but there is no reference to January 1st 2020.

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