

TRAPS IN SELLING, LET THE VENDOR BEWARE!



One of the better known legal maxims is the expression “caveat emptor” or let the buyer beware. The maxim reflects the principle that a seller of property or goods has few obligations, and it is the buyer who must ensure that what is being purchased meets the buyer’s expectations and needs in all respects. In recent times, various statutes have affected this principle of law - sometimes leaving a vendor exposed to claims from the purchaser after a sale has been completed. Gerard Kilpatrick, partner in the Auckland Lawlink firm of Webster Malcolm & Kilpatrick, looks at the maxim with particular regard to real estate.

Twenty to thirty years ago, a vendor of real estate needed to be concerned with one thing only when selling – the price. So long as the sale price was what the vendor wanted, the vendor could safely sign the contract and, in the absence of deliberate deception, be concerned about little else.

Today, a vendor of real estate cannot be so complacent. There are two principal Acts of parliament that affect the sale process. The first is the Contractual Remedies Act 1979, which has the effect of preventing a vendor from including a provision in a contract that the purchaser buys wholly on the basis of their own judgment and that the vendor takes no responsibility. Under

the Act a court can, if it considers it fair and reasonable to do so, disregard such a provision. The court will take into account all the circumstances, including such matters as the relative bargaining strengths of the parties and whether the parties had a solicitor. Further, if the vendor has made a misrepresentation, the purchaser may be able to cancel the contract. This will be the case if the truth of the representation is essential to the purchaser, and it will either substantially increase the benefit or reduce the burden of the contract to the purchaser.

The second statute is the Fair Trading Act 1986, which prohibits **deceptive or misleading** conduct in trade. A private seller of real estate is not usually **in trade** but can be liable if a real estate agent, who is in trade, makes deceptive or misleading representations on the vendor’s behalf in the course of the sale negotiations. For example, if a real estate agent were to advertise a property as having a **magnificent view** knowing full well that there is a proposed development that will obstruct the view, both the agent and the vendor (as the agent’s principal) could be liable to the purchaser. *Lawton v Norcross (2000) 6 NZBLC 103,030*, a decision of the High Court, illustrates this point. The real estate agent had given wrong information as to the area of the house, and both the agent and the vendor were held liable in damages.

In addition to these statutes, the commonly used sale and purchase agreement for real estate contains a number of warranties by the vendor which, if wrongfully given, could lead to a claim for damages and in some instances give the purchaser the right to cancel the contract. These warranties include:

- that the vendor has not received any notices relating to the property, such as a letter from the local authority requiring various works to be done;
- that the vendor has not given any consent to an application for a

resource consent, an example being for the construction of a boarding house in the same street;

- that if the vendor has undertaken any work on the property, the required building permit or consent was obtained;
- no notice or demand affecting the property has been delivered to the purchaser.

If the property is a crosslease or unit title, there are further or additional warranties, breach of which could give a purchaser a claim in damages or lead to cancellation. The above is not a complete list of the warranties in the standard agreement but illustrates the most common grounds upon which vendors can be held liable.

Therefore, the maxim **caveat emptor**, while it still applies, does not have the strength it once had. Today, there is a case for developing a new maxim, **caveat venditor** (let the vendor beware), which is equally appropriate. This arises because the vendor can incur liability in damages for breach of the Fair Trading Act 1986, or for making false representations on sale, or for breach of the warranties in the standard sale and purchase agreement.

Whether you are a purchaser or a vendor, don’t take the risk. Do not believe bland assurances that the form is **standard** and quite all right for you to sign, or that your lawyer can fix up anything that is wrong. Obtain advice, particularly before signing that real estate contract – no matter who tries to pressure you to do otherwise. ■

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