

Taking a hammering

Sales or purchases of property at auction may seem like simple transactions, but solicitors who don't take care over the details could put themselves, and their clients, at huge risk. **James Swede** explains how to avoid the potential pitfalls

There are many reasons why a client may want to sell a property at auction. The property may require substantial work more suited to a property developer, or it may have planning difficulties, or be difficult to value because of lack of comparables. Alternatively the transaction may be a probate sale or receiver sale, and the executors or receivers want to sell by auction to comply with their duty to obtain the best price possible.

Whatever the reason, the advantage, of course, is that, when the hammer comes down, the buyer is contractually bound. However, this does not mean sellers or solicitors can shirk their duties to make it clear what they are selling, and disclose everything that should be disclosed.

There is something about the auction sale that changes the way we naturally think as solicitors, and makes us pay less attention to detail. We may think of such a sale as simpler than other transactions – something to pass over to a trainee to handle. We may think the risk rests with the auctioneer, as they are the ones advertising the property.

But it isn't as simple as that. These days, more than ever, we need to be especially careful about the accuracy of the information we present to a potential buyer or solicitor. We can't simply rely on *caveat emptor*. If you know something that you think should be disclosed, you must disclose it. If your client refuses to allow you to do so, you must cease acting. If you don't, it's not just the client who could be at risk – from a potential claim for breach of contract for misrepresentation or non-disclosure – but also you, from a subsequent negligence claim by your client, or a professional misconduct report by a buyer's solicitor who believes you have deliberately misled them. These days, in this harsh insurance environment, no insurer looks kindly on claims generated by pure carelessness.

So what do we, as solicitors, need to do? This article outlines a number of steps to take to make sure sales at auction go smoothly for everyone involved.

1. MAKE SURE THE DETAILS ARE ACCURATE

Most, if not all, auctioneers will send you a copy of the catalogue proof, which you should double-check with your client to make sure the property details are absolutely accurate. If, for instance, the property is tenanted, ensure the rent and tenancy details are absolutely correct. This part of the process is not, however, always straightforward. In situations where the details depart from the norm, there may be a struggle between auctioneer and solicitor as to who takes responsibility for the accuracy of the information.

Take, for example, the recent case in my firm of a solicitor selling, for an investor client, and through a leading auctioneer, a

building which had a supermarket as a tenant (although not in occupation). The difficulty was that the tenant itself was, in fact, a wholly owned subsidiary of the supermarket, acquired as part of an acquisition of another supermarket many years earlier. The supermarket was paying the rent and accepted it was the tenant, but some of the corporate paperwork to prove the link was missing. The question was how to present that to the potential auction purchaser. The auctioneer wanted the solicitor to take responsibility for this, and confirm in writing that the tenant was, indeed, a wholly owned subsidiary. The solicitor wanted the auctioneer to take the responsibility, since it was the auctioneer which was marketing the property, and he felt it was up to it and the client as to how they wished to present the property to the purchasing public – he advised that the particulars should specify that, although there was some corporate information missing, all parties accepted that the supermarket was the tenant. The auctioneer, of course, did not want to present it in this way, because it lessened the chances of the property selling, and created uncertainty in potential buyers' minds.

The end result, after much heated debate, was that the client heeded his solicitor's advice and the property sold for top money. I think the lesson is to stick to your guns. The auctioneer should respect your position, and if you make that clear to them, it will bode well for your future dealings with them.

2. TAKE CARE WITH SPECIAL CONDITIONS

Special conditions of sale can be the cause of many problems, for both the buyer's and the seller's solicitor. If you are acting for the seller, pay particular attention to drafting. Sticking slavishly to precedents should be avoided; things will be left in that should have been omitted, and other things will be omitted which should have been included.

If you are acting for a buyer, advise your client pre-auction to read the special conditions carefully. It has, for example, recently become the norm for sellers' solicitors to provide for their costs to be paid. These are often significant, and the relevant clause is often well-hidden, such that a layperson may not spot it. A client of mine recently bought a £250,000 house at auction, and ended up paying fees of £5,000. I have no problem with the trend, but I do think that any such provisions should be announced before bidding starts, so that the audience is fully aware of them when deciding whether and how much to bid. It still amazes me that this does not happen in practice.

3. DON'T FORGET THE DEPOSIT

The deposit may be held as agent; if so, make sure the auctioneer releases it to you well in advance of completion (less their costs, of

course). Your client will not thank you if all the money is not available to send to them on completion.

4. CHECK THE CONTRACT

Obtain a full copy of the auction pack, if you have not seen it already, and read it carefully.

Are there searches? If not, make sure you apply for them in time, and carefully check the results for anything that does not tally with the information provided at auction.

Talk to your client about anything unusual. Did they know about the insurance claim for subsidence? Is the benefit of the claim to be assigned to them on completion? Was it properly disclosed in the auction particulars? If not, raise this at an early stage, and put the seller's solicitor on notice so you and your client can investigate further.

Does your client know that the special conditions specify a two-week completion, rather than the usual four? Did the auctioneer announce this, or make an addendum to the catalogue? Tell the client the date, and diarise it correctly.

Does the tenancy schedule marry up with the documents supplied to you and the catalogue particulars?

Is VAT an issue? If the sale is to be treated as a transfer of a going concern, make sure you advise your client, if they have not already done so, to make a VAT election.

The point I am trying to make is that, as a buyer's solicitor, you cannot simply accept that, just because the hammer has come down, everything is fine. A multitude of things can still go wrong and often do, even at that point. Pay great attention to detail and be careful.

A CAUTIONARY TALE

If you don't take the time to do all these things, you can put yourself and your client at enormous risk.

Take the (real-life) example of a client wanting to sell at auction a freehold ground rent investment, comprising some 20 or so flats sold off on long leases, but which is, importantly, part of a much larger title. The rest of the title comprises a significant development site. The solicitor instructed thinks this is a classic job for a trainee, because it seems fairly straightforward, and he cannot be bothered with such a small sale. The trainee prepares the special conditions of sale, sticks them in front of the solicitor's nose at 5pm the next day, and, in a rush, the solicitor approves them.

The solicitor forgets that this is a sale of part, and fails to spot that the trainee has not attached to the special conditions a plan of the area to be sold, nor drafted a transfer of part to be entered into on completion. The auctioneer, however, has correctly described the details in the catalogue, and illustrated a plan of the land to be sold.

The hammer goes down. Unbeknown to the solicitor, he is not selling a freehold ground rent investment worth £100,000, but a development site worth several million pounds! The buyer had

noticed the error and, realising he can score a major windfall, writes to the seller's solicitor with a draft transfer of the whole. The solicitor realises what has happened. Hairs rise on the back of his neck. Sweat beads on his forehead. The trainee, petrified, is called in to the room, and leaves in tears.

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What can the solicitor do now? Well, quite properly, he immediately notifies his professional indemnity insurers. The insurers instruct the solicitor to intervene immediately, on the basis that this is an obvious mistake, and as any professional auction purchaser should have known, particularly given the fact that the auction catalogue particulars were correct. The buyer, however, knows that the seller has a weakness, because the insurers are involved, so he constructs various arguments in his favour.

After several weeks, the insurers recommend a nuisance settlement to bring closure, the cost of which the seller's solicitor has to pay from his policy excess. The solicitor's client also successfully pursues the solicitor for damages based on the loss of interest, and the fact that his solicitor knew he needed the funds for another deal and had to raise funds elsewhere at significant cost. Needless to say, the solicitor loses the selling client forever, and his partners are not happy at having to shell out thousands of pounds from their policy excess.

This is not an example plucked from the air. It really happened. And it could so easily have been avoided if the solicitor had properly supervised the trainee and paid more attention to detail.

A great deal of case law arises out of misrepresentation and non-disclosure in auction sales. Such cases lead to difficult questions about whether the misrepresentation or non-disclosure induced the buyer to exchange contracts, and complex arguments surrounding the level of damages. Follow some of the practical advice above, and it should go some way to avoiding your involvement in any such litigation. ■

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