What is the Rule of Caveat Emptor and to What Extent Does Part V of the Housing Act 2004 Undermine the Rule?

Richard Williams

Abstract

“The historic rule underlying land transfer is the principle of caveat emptor; let the buyer beware.”¹ This principle affords little protection to a purchaser who is responsible for establishing all relevant aspects concerning the property to be purchased. Conversely HIPs are intended to place an onus of limited disclosure on the vendor of a property and thus offer a greater degree of protection to the purchaser. The author aims to consider the dichotomy of this conflict and analyse the nature and status of caveat emptor as well as its role with HIPs newly implemented.

It seems a natural progression for the author of this article, having been an estate agent for seventeen years prior to commencing a law degree, to investigate this topic. Professionally the author frequently faced the challenges the rule of caveat emptor created in opposition to increasing legislative restrictions. During the early 1990s, assisting the DTI with research into proposals of reform, personal and professional comment was required, together with the viewpoints of purchasers and vendors of a representative number of property transactions. By the time of departure from estate agency, change was inevitable and HIPs were on their way.

In evaluating the role of caveat emptor, special attention will be given to the origins and the extent of the rule. Analysis will then focus on the impact caveat emptor has on the current conveyancing process (i.e. pre-HIPs), the content of Part V of the Housing Act 2004 (essentially HIPs) and finally the likely effect upon the rule. A conclusion will then be drawn as to whether caveat emptor or disclosure under HIPs will prevail, and if so under which circumstances.

The impact of this work will suggest that despite legislative reform to ease the conveyancing process and afford improved protection to purchasers the established principle of caveat emptor remains and will continue to do so.

[Please Note: Any reference to solicitors when acting in the purchase of land or property will include licensed conveyancers, who came into being following the Administration of Justice Act 1985.²]

The Origins of Caveat Emptor

Establishing the origins of caveat emptor has proved to be more problematic and less structured than anticipated, one reason is that many text books and journals avoid the whole topic. Although thought to originate from Roman law,³ the interpretation of

² Administration of Justice Act 1985, ss. 11(4) & 38(1).
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caveat emptor into English law has created a difference to that of Roman law, the latter of which requires an environment of good faith. To ascertain the integration of this difference, the development of English Law will be considered.

During the early Middle Ages trade was condemned as a sin as it was deemed to be carried out for worldly and not heavenly benefit. The dominant approach of the period was authority and caveat emptor is not to be found. Thomas Aquinas, considered a great authority on Christian conduct, differentiated wrongful trade, which was carried out for profit, from rightful trade which serves public necessity. On the question of conduct, he asked; “is a sale rendered unlawful by a defect in the thing sold?” He answers that a defect in kind, quantity or quality, if known to the seller and unrevealed, is sin and fraud, and the sale is void. If the defect be unknown it is no sin, but he questions: “is the seller bound to mention any flaw in the thing sold?” He seems to answer in line with the adage “a buyer’s eye is his merchant where the defect is obvious.” This approach concurs with the principle of caveat emptor.

John Wycliff lists avarice as one of the seven deadly sins allowing ecclesiastical jurisdiction to cover all trade. Although only those of the faith were bound by the jurisdiction of the Church, the reformation had caused virtually everyone to be included within the ecclesiastical community, which could not accept that a seller was not responsible for the quality of his wares.

Historically, as England progressed, trade was able to develop, albeit within the confines of statute and custom. At first it was considered acceptable to trade for public necessity and this expanded until trade was ultimately controlled on a national basis. Professor Hearnshaw, writing in 1908, felt the salvation of the soul had been replaced by the might of the Kingdom; but business was still the instrument of man’s necessities. There was a desire for profit which did not allow for the notion of caveat emptor.

The phrase caveat emptor seems to epitomise centuries of experience. Originating in Rome (regarded by some academics as the great law giver) it comes with the repute of the classics and the prestige of authority, yet its exact origin cannot be traced by the author, notwithstanding extensive attempts to do so. No Roman author whose works survive has written the two words together, yet its Latin origin is beyond doubt. Emptor meaning buyer, and cavere, a verb of caution, can be traced to Titus Macchius Plautus, renowned Ancient Roman playwright. It is doubtful whether the phrase

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6 Ibid, 93-94.
7 Ibid, 94-97.
10 F.J.C. Hearnshaw Leet Jurisdiction in England (1908) p. 212.
12 Ibid.
13 III Thesaurus Linguae Latinae (1907) 630-644.
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could have come to England by any intellectual route, the author has already established it could not have made its appearance by way of canon law or ecclesiastical authority.

Initially, any issue was solved not by the law of the land but according to the usages and customs of merchants known by some as the *lex mercatoria*, the law merchant. Early reference is made to the fair at St. Ives where items were sold and disputes arose, especially over sharp practices, and the court considered mercantile usages in the thirteenth and fourteenth centuries. A single case out of fifty heard, turns on the point of whether a trader should be responsible for the quality of his wares and the decision supports “credit and not distrust” for the basis of commercial dealings. Yet it has been said that “as maxim, custom and rule, *caveat emptor* is a product of the Middle Ages” though such statements can be little more than declarations.

It took time for the realisation that an unconsidered bargain that turned sour was one’s own ‘tough luck.’ This stance culminated into the approach of *caveat emptor*, yet can this rule claim to be an ancient maxim of the common law?

The term *caveat emptor* emerges for the first time in its struggle for status in the sixteenth century. Anthony Fitzherbert wrote when referring to the sale of horses, “if he be tame and have been rydden upon, then *caveat emptor*.” Coke twice set down the maxim he helped make famous in his treatises on the law when discussing the Statute of Elizabeth concerning Sellers of Horses in Fairs and Markets [1589].

In *Co Litt*, a case regarding the warranty of land between a landlord and tenant, Coke stated “note that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, either in deed or in law; but the common law bindeth him not, for *caveat emptor*”. However even Sir Edward Coke could not affirm the origins of the ancient maxim; instead it had a rather unconventional entrance into the law reports.

In *Moore v Hussey* a rule of law emerged; “*caveat emptor, qui ignorari non debuit quod alienum jus emit*” and it has the authority of the second Statute of Westminster enacted during the reign of Edward I. This ancient statute has however been misquoted as the word which proceeds *empotor* is not *caveat*, it instead is *expectet*. Walton H. Hamilton believes the changes are quite contrived and purposive. A different case that remained unreported for half a century and gave the prestige of

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14 The Law Merchant, supra note 148 at cv.
15 2 The Law Merchant, supra note 148, at 28-30. Pleas of Juries and Assizes at Romsey in the County of Southampton (1278).
16 Scrutton, Elements of Mercantile Law (1891) 23.
17 3 Encyclopedia of Social Sciences 280 (1930).
18 Fitzherbert, Boke of Husbandrie (1534) 118.
19 Coke, The Second Part of the Institutes (1642) 714.
20 Statute of 31 Elizabeth, 12.
23 The Second Statute of Westminster 1285.
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authority to the rule of *caveat emptor* is *Chandelor v Lopus*, which concerned a bezoar stone and stood alone as a landmark of the law and determinable only by the interpreters’ application. Latent defects were the purchaser’s own lookout. P.S. Atiyah considers it remarkable that this case concerned a semi-precious stone found in the stomach of some animals and with alleged ‘magical’ properties, should have laid a foundation for the rule of *caveat emptor*.

The rule of *caveat emptor* entered English legal usage on the back of an excerpt from Anthony Fitzherbert, a distinction recognised by Coke, a doctored Latin quotation and support for a number of cases. “But the words were there, ready to bear the ideas of a later age, and interpretation, the great creator, was to prove equal to the occasion.”

It was not until the latter part of the eighteenth century that the rule of *caveat emptor* regularly raised its head, in an environment much different from the Stuart period, due mainly to the Industrial Revolution and large scale production, which effected a change in approach by the courts. During the eighteenth century, the revolt against authority, together with an age of natural law and the approach of emerging *laissez faire* allowed a very different English law to reconsider the maxim of *caveat emptor* and develop it further. This was a period when friction could be observed between the common law and mercantile custom. *Caveat emptor* was more often voiced by counsel. Indeed the approach of William Blackstone was not dissimilar to Aquinas’ all those centuries before. Professor Richard Wooddeson, who succeeded Blackstone in the Vinerial Chair at Oxford, considered *caveat emptor* a “very uncontentious maxim” which seems “to have prevailed” and even “exploded,” though John Fonblanque took the opposite view. The views of William Murray, First Earl of Mansfield, had the most influence, as a forerunner of the new approach. Atiyah believes Murray thought individuals should make their own decisions, exercise their own prudence and judgement and ask for a warranty if they wanted one.

The approach to the rule of *caveat emptor* by the courts during the nineteenth century was inconsistent. The Court of Exchequer, with Abinger C.B. and Parke B. supported, the severity of the rule whereas the Court of Kings Bench, influenced by Lord Ellenborough C.J., fluctuated in approach between *caveat emptor* and implied warranty. *Caveat emptor* was held to prevail by Lord Ellenborough C.J. in *Baglehole v Walters* provided the seller did not take positive action to prevent the detection of the defects. Sir William Best C.J. who presided in the Court of Common Pleas (1824-1829), had a strong “moral sense” and regarded *caveat emptor* as a “highly immoral

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29 Ibid.
36 *Baglehole v Walters* [1811] All ER Rep 500.
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principle.” Atiyah believes that during the nineteenth century the rule of caveat emptor represented the “apotheosis of individualism.”

During the nineteenth century, the cost of litigation against the supplier of faulty goods outweighed the value of these goods. This allowed prices to be levied according to the risk involved; in effect caveat emptor dictated pricing. In Beachey v Brown, a man who entered into a contract to marry a woman with a fine head of hair that turned out to be a wig was held bound by caveat emptor. Compton J stated “the real distinction as to circumstances showing or not showing fraud is between active and passive concealment.” Apart from an express warranty, protection to a consumer during the nineteenth century was in the form of either the laissez faire approach where a consumer could refuse delivery of faulty goods or from fraudulent sellers, though Lord Eldon recognised that fraud did not include non-disclosure. According to Herbert Spencer some academics of the time were critical of the lack of consumer protection. In Hopkins v Tanqueray, considered a leading nineteenth century authority, an express statement made when selling a horse was held by Jervis C.J. to be “a representation only” and caveat emptor prevailed.

Conversely there were two notable cases that can be viewed as early representations of consumer protection; in the Exchequer Chamber, Bigge v Parkinson, concerning the supply of troop stores, and the Queen’s Bench case of Jones v Just, which concerned the sale of Manilla hemp that the buyer had no opportunity to inspect. Both merchantable quality and fitness for purpose were considerations in these cases. The decision in Piggott v Stratton suggests the nineteenth century was by no means the heyday of caveat emptor and Atiyah believes caveat emptor was in part a nineteenth century myth perpetuated by Sir William Anson.

In 1913, the case of Heilbut, Symons & Co v Buckleton saw the House of Lords give compelling authority to the rule of caveat emptor. An investor could not rely on the representations of a merchant representing his employer who had underwritten a large number of shares in a rubber company. It was with “great reluctance” that Viscount Haldane L.C. reached this conclusion; in doing so overruling the decision of the Court of Appeal and the findings of a jury. Generally, the law stated that the buyer who at the time of the sale has failed to obtain positive assurances against future contingencies had to suffer the consequences.

From this point in history caveat emptor has not applied as vigorously in England as is believed instead triumphing more dramatically in America. Commencing with the early nineteenth decision in New York of Seixas and Seixas v Woods. Continuing

47 Heilbut, Symons & Co v Buckleton (1913) A.C. 30.
49 Seixas and Seixas v Woods 2 Caine R. 48 [N.Y. 1804].
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into the twentieth century, seen by the decision in *Cudahy Packing Co. v Narzisenfeld*\(^{50}\) when a sample which was good, served well enough to effect a sale of eggs, but did not prevent the buyer having to pay the full price for a mouldy lot. Although the rule was tempered in *MacPherson v Buick Motor Co*\(^{51}\) when a defective wheel, that would have been obviously defective upon inspection, did not fall within the rule of *caveat emptor*, the manufacturer was liable as the defect was ‘inherently dangerous.’

The English judiciary did not discover until the nineteenth century that *caveat emptor* sharpened wits, taught self reliance, made a man into the economic man out of a buyer, and served well its two masters, business and justice.\(^{52}\) *Caveat emptor* is not yet a historical rule and remains prevalent in English law; a hybrid form of *caveat emptor* still allows a purchase to involve a degree of risk.

It can be seen that the refusal over time by the judiciary and Parliament to provide effective protection to a purchaser has given the rule of *caveat emptor* strength in English law. In the U.S. Mr Chief Justice Shaw felt that *caveat emptor* has been a matter of judicial opinion, “a value if you will, a principle if you must” which directs even the rules of law to its own ends.\(^{53}\)

During the nineteenth century, the rule of *caveat emptor* obtained a stronghold in shipping and maritime law. Often a ship was elsewhere in the world when sold, insured or financed and details could not be verified and the rule of *caveat emptor* prevailed. In *Barr v Gibson*\(^{54}\) a ship was stranded on a rock in the Gulf of St Lawrence, and was sold in London. There was no proof that the seller knew of the stranding, and the courts had to consider whether the vessel was still a ship considering the possibility that it might remain stranded. The court accepted the vessel was not a ship under the law of insurance and possibly not under the definition of sailing. Yet still the rule of *caveat emptor* applied and the contract of sale was valid as the ship had not ceased to answer its description.

Rogue traders were able to take advantage of the rule of *caveat emptor*, in *Omrod v Huth*,\(^{55}\) a cargo of cotton had been purchased by sample, and almost a third had been falsely packed; the outside layers were of the quality of the sample but the interiors were of bad quality. The court refused to take notice of the custom to the trade and held the rule of *caveat emptor* applied.

The harshness of the rogue trader did in the latter part of the nineteenth century create the need for legislation to protect the innocent consumer. The *Sale of Goods Act 1893*\(^{56}\) which took four years to draft, introduced new concepts and the implied terms

\(^{50}\) *Cudahy Packing Co. v Narzisenfeld*, 3 Fed (2d) 567 C.C.A. 2d, [1924].


\(^{53}\) Norway Plains Co. v Boston & Maine R. R., 1 Gray 263, 267, [Mass. 1854].

\(^{54}\) *Barr v Gibson* [1838] 3 M. & W. 389.

\(^{55}\) *Omrod v Huth* [1845] 14 W. & W. 651.

\(^{56}\) *Sale of Goods Act 1893.*

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set out in the Act represent the first steps towards the partial demise of the rule of *caveat emptor*.\(^{57}\)

Further statutory protection did not occur until 1973\(^{58}\) and 1977\(^{59}\) and then 1979\(^{60}\) with the modernised Sale of Goods Act. Since 1\(^{st}\) January 1973 Directives from the European Union have afforded further protection.\(^{61}\) The rule of *caveat emptor* has today been all but distinguished from consumer contracts and in many respects *caveat venditor*, let the seller beware, indicates a new approach, although private sellers are not generally included within consumer rights legislation. Instead a private seller, as other sellers, are subject to the requirements of the Misdescriptions Act 1967\(^{62}\) which allows a person who enters into a contract after a misrepresentation has been made by another person and a loss has been suffered, to obtain damages if the misrepresentation had been made fraudulently. If not fraudulent the claimant must prove reliance and reasonable grounds to believe the misrepresentation up to the point the contract was made.\(^{63}\)

The origins of *caveat emptor* are not obvious and the principle certainly has enjoyed a chequered development. Clearly, the harshness of the rule has been tempered by legislation, particularly with regards to consumer contracts. Yet *caveat emptor* remains prevalent within particular areas of the English legal system.

**The Rule of Caveat Emptor**

The rule of *caveat emptor* became integrated further into English Law during the nineteenth century, often in situations of conflict between the conditions for the sale of land and misrepresentation.\(^{64}\) In this chapter, attention will be given to case law and particularly the approach of the courts, before considering twentieth century case law to establish the strength of the rule and its application in English Law today.

The decision of the Court of Appeal in *Watson v Burton*\(^{65}\) is considered the leading authority. An innocent misstatement of particulars occurred in an auctioneer’s description of a warehouse. A claim of 3920 square yards of property actually amounted to 2360 square yards. The conveyance itself referred to The Law Society’s SCOS, particularly condition 35; which required each property or lot to be correctly described as to quantity and any error or omission would not annul nor allow compensation to be claimed, unless the property differed substantially from that agreed to be sold or purchased. The dichotomy for the Court was to consider whether the difference in the size of the property was sufficiently substantial to allow the purchaser to repudiate the contract. Thus preventing the vendor from successfully bringing an action for specific performance (an equitable remedy) for the purchaser to complete and pay the monies due.


\(^{61}\) For example, Directive 1999/44/EC.

\(^{62}\) Misdescriptions Act 1967.

\(^{63}\) Ibid, s.2(1).


\(^{65}\) *Watson v Burton* [1957] 1 W.L.R. 19.

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Wynn-Parry J, in *Watson v Burton*⁶⁶ referred to the nineteenth century case of *Flight v Booth*⁶⁷ concerning the sale of leasehold business premises at auction, when Tindle C.J. found difficulty in reconciling two questions. Firstly does the property conveyed differ materially from the property agreed to be sold? Secondly; will the purchaser be prejudiced by such a difference? He considered a non-fraudulent misrepresentation that was material and substantial. If known of may have prevented the purchaser from entering into the contract (and the contract makes no provision for compensation in such circumstances) the purchaser may be regarded as not having purchased the thing that was “really the subject of the sale.”

In *Watson v Burton*⁶⁸ reference was also made to *Jones v Edney*⁶⁹ when a purchaser was considered not having purchased the property which was the subject of the sale. At auction the property being sold was claimed to be ‘a free public house’ when a covenant existed restricting the supply of beer to a particular brewery. This misdescription was held to be fatal and the purchaser was able to rescind the contract and recover the deposit. Wyne-Parry J in the former case, recognised that Lord Eldon had confirmed this approach in *Portman v Mill*⁷⁰ when considering “how far a trivial or substantial error makes a difference.” An order for specific performance failed when the purchaser of a farm could not obtain what he had contracted to buy.

Applying the decision of *Re Puckett and Smith’s Contract*,⁷¹ concerning the sale of building land that was not fit to build upon, Wynn-Parry J⁷² felt the difference in area in the present case amounted to a discrepancy of approximately forty per cent and was therefore substantial to a degree that condition 35 of The Law Society’s SCOS could be disapplied. An order for specific performance by the vendor failed. Instead the counter-claim by the purchaser was allowed.

The decision in *Watson v Burton*⁷³ made reference to many nineteenth century cases when the implications of the integration of *caveat emptor* challenged SCOS and claims of misrepresentation. Further consideration of case law will illustrate the approach of the courts to such challenges, many of which did not expressly consider the rule of *caveat emptor*. *Whittemore v Whittemore*⁷⁴ was a case similar in fact but not in outcome to *Watson v Burton*.⁷⁵ A property claimed at auction to extend to 753 square yards actually extended to 573 square yards. Sir R. Malins V.C. felt that although there was a discrepancy in the area of the property being sold the SCOS were sufficient to put a purchaser on inquiry to verify the quantities stated in the particulars of sale. However in *Whittemore v Whittemore*⁷⁶ the SCOS allowed for compensation for any error and £100 was held sufficient.

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⁶⁹ *Jones v Edney* [1812] 3 Camp. 285.
⁷⁰ *Portman v Mill* [1826] 2. Russ 570.
⁷¹ *Re Puckett and Smith’s Contract* [1902] 2 Ch. 258.
⁷⁴ *Whittemore v Whittemore* [1869] L.R. 8 Eq. 603.
⁷⁶ *Whittemore v Whittemore* [1869] L.R. 8 Eq. 603.
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Notice and inspection were held to be of importance in *Smith v Hughes*, Sir Alexander Cockburn held that without express warranty, where the buyer has inspected the goods, *caveat emptor* will apply to any defective quality. There was no obligation to inform the buyer of a mistake and fraud or deceit did not apply. Sargent J referred in *Re Courcier and Harrold’s Contract* to T. Cyprian Williams regarding the SCOS, “the common form of this condition provides for allowing compensation if any error, misstatement or omission, be discovered in the particulars of sale; and it appears that these words are applicable.” Often SCOS can be seen to follow the same principles as the rule of *caveat emptor* although Williams’ presumption of compensation is in contrast to the rule.

The Court of Appeal upheld the rule of *caveat emptor* in *William Sindall v Cambridgeshire CC* when the purchaser of land was not entitled to rescind the contract when an undisclosed sewer was discovered after completion which had a detrimental effect on the value of the land. It was held that there had not been a misrepresentation and mistake was not relevant as the vendor did not have “within his knowledge” the existence of the sewer.

More recently, in *Taylor v Hamer*, a case regarding the removal of flagstones at a property between the sale agreement, subject to contract, and completion, the principle of *caveat emptor* was held not to apply in circumstances of fraudulent concealment. Mrs Hamer had fraudulently responded to the purchaser’s pre-contractual enquiries, over ruling the doctrine of notice. Arden L.J. dissented, believing the flagstones did not constitute property and were therefore not part of the sale, which did not become binding until an exchange of contracts.

The courts were challenged by the widely publicised case of *Sykes v Taylor-Rose*, when failure to disclose that a murder had occurred at a property was held not to constitute misrepresentation and *caveat emptor* prevailed. Having agreed to sell the property the vendor answered negatively to question 13 on the SPIF: “Is there any other information which you think the buyer has a right to know?” This was held to be an accurate response, thus it would appear the doctrine of silence has developed differently in the conveyancing process to usual contractual agreements, this may be considered a policy decision.

A vendor who wishes to correct an earlier misstatement must do so carefully and fully; in *Clinicare Ltd v Orchard Homes* a written indication by the property owner during negotiations for a lease that he was unaware of the presence of dry rot amounted to a fraudulent misrepresentation that carried with it a negligent misrepresentation that reasonable steps had been taken to see whether dry rot existed. A subsequent verbal statement by the owner had inferred a historic existence of dry rot.

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77 *Smith v Hughes* [1871] All ER 632.
78 *Re Courcier and Harrold’s Contract* [1923] 1 Ch. 565.
83 *Clinicare Ltd v Orchard Homes & Developments Ltd* [2004] WL 1476622.
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rot had not corrected the implied representation that reasonable investigations had been carried out by the owner.

As a general rule silence cannot amount to a misrepresentation as there is no duty to disclose facts that would influence whether a person would enter into a contract. This rule has its origins in the classical theory of contract. 84 There are however three exclusions to this rule: change of circumstances, as occurred in With v O’Flanagan 85 concerning the sale of a solicitors’ practice; the statement made is only part of the truth, as in Dimmock v Hallett 86 when a mortgagee bid at auction to ensure the mortgage debt was covered; and uberrimae fidei (utmost good faith) for example insurance contracts as in Seaman v Fonereau 87 when a material circumstance of danger was concealed from the insurer that invalidated a marine insurance policy, even though the circumstance did not create the loss.

The conveyancing process has developed within the twentieth century in the absence of a similar rule to contract law. There have been attempts, which will be given consideration later in this thesis, through legislation and procedure in the latter part of the twentieth century to harness the freedom that caveat emptor enjoyed in the conveyancing process. Theodore B.F. Ruoff 88 stated that an agreement for the sale of land is not a contract uberrimae fidei and a purchaser who neglects to make a proper investigation of the vendor’s title must bear the risk involved.

The rule of caveat emptor has been used as a basis for the development by the courts of the rule of caveat lessee, recognised in Erskine v Adeane, 89 concerning a dispute between landlord and tenant of a farm in Cambridgeshire. Sir G. Mellish LJ stated “the law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule of caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it.” This approach remains valid today, as confirmed in Baxter v Camden LBC. 90 When this case was heard originally at the London County Court, Judge Green QC held the principle caveat emptor applied in the landlord and tenant field an approach upheld on appeal.

Today the rule of caveat emptor survives limited by legislation and procedure. Predominantly in land transactions, 91 but also seen sometimes to prevail in contracts between private sellers (goods are often ‘sold as seen’), shipping and maritime law contracts 92 and the sale of antiques and other items at auction, 93 albeit tempered by the claims of professional negligence. Although non reliance on the description of a painting bought following a proper examination was not an essential part of the

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85 With v O’Flanagan [1936] Ch 575.
87 Seaman v Fonereau [1743] 2 Stra 1183 146.
90 Baxter v Camden London Borough Council (No 2) [2001] QB 1.
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contract when discovered to be a forgery in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*\(^{94}\) and *caveat emptor* prevailed.

Within the conveyancing process the doctrine of notice supports the rule of *caveat emptor*. Prior to completion, two final actions must be undertaken; to search for registered land charges or where the title is registered to search for adverse entries on the register of title. The doctrine of notice is insignificant in the system of land registration, an entry on the register of title is recognised as the only kind of notice.\(^{95}\) A purchaser for value takes the property subject to all overriding interests and minor interests protected on the register, whether or not they are known of. Although the purchaser’s interest is free from persons in actual occupation whose rights are not disclosed upon inquiry.\(^{96}\)

An equitable interest in unregistered land relies more heavily upon the doctrine of notice, and the notice may be actual, constructive or imputed.\(^{97}\) Actual notice is where the interest is known of by the purchaser. Constructive notice was developed by Chancery Judges and is the existence and knowledge so strong that a presumption can be made that the purchaser is put on notice to investigate further.\(^{98}\) This principle is now reflected in legislation,\(^{99}\) although if a reasonable, though incorrect reply, is given to an enquiry, there is no duty on the purchaser to pursue the inquiry further.\(^{100}\) Constructive notice can occur in three ways; failure to make proper investigation of title; notice from inspection of the deeds; and failure to inspect the property. Finally imputed notice is where actual or constructive notice is available to the purchaser’s agent,\(^{101}\) for example solicitor, and is imputed to the purchaser.

With regards equitable interests, a *bona fide* purchaser for value of the legal estate takes free from any equitable interests of which he does not have notice of; he is termed ‘equity’s darling.’ In its strictest sense the *bona fide* purchaser rule has no relevance to registered land and the doctrine of notice has been severely curtailed by the system of registration under legislation,\(^{102}\) its historic role has been largely displaced\(^{103}\) but is by no means eclipsed.\(^{104}\)

A purchaser would be advised by their solicitor to physically inspect the land and/or property immediately prior to completion. This would ensure an interest does not exist which has remained undetected or has not arisen since the purchaser last carried out an inspection or last raised enquiry. Also the property condition can be verified as the

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\(^{94}\) *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.

\(^{95}\) *Williams & Glynn’s Bank Ltd v Boland* [1981] AC 487.


\(^{98}\) *Jones v Smith* [1841] 1 Hare 43 at 55.

\(^{99}\) Law of Property Act 1925, s.199.

\(^{100}\) *Re Alms Corn Charity, Charity Commissioners v Bode* [1901] 2 Ch 750.

\(^{101}\) Ibid.

\(^{102}\) Land Charges Act 1972.


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same prior to exchange of contracts, subject to fair wear and tear. At this stage the rule of \textit{caveat emptor} plays a vital role, a purchaser who is not vigilant may be bound by an overriding equitable interest.

\textbf{The Impact of \textit{Caveat Emptor} on the Conveyancing Process}

Whilst considering the impact of the rule of \textit{caveat emptor}, investigations will initially focus into whether any of the examples of its application already discussed namely maritime cases and the sale of antiques have been considered or applied in conveyancing cases. The meaning of conveyancing will be discussed before looking at the practical effect \textit{caveat emptor} has on the conveyancing process, including attempts to restrict the rule prior to concluding its impact.

\begin{itemize}
\item[i)] The application of \textit{caveat emptor} in conveyancing cases
\end{itemize}

The rule would appear to have developed as a concept by the courts to apply in situations considered appropriate. A direct correlation between differing cases and applications of \textit{caveat emptor} does not, on initial investigation, seem to exist. However some subtleties of cross application do exist and attention will be given to considering the detail of such instances together with other occasions when cross application has not occurred.

It may prove helpful to understand the application of \textit{caveat emptor} with regards to maritime and shipping cases. In \textit{Reeman v Department of Transport}, a case regarding the purchase of a ship and a ‘Seaworthy Certificate’, the decision relied upon professional negligence and the principles stated in \textit{Caparo Industries PLC v Dickman} were applied. In \textit{Canadian Yacht Sales v MacDonald}, the Canada Supreme Court of Ontario reached a decision based upon the rule of \textit{caveat emptor}, and in \textit{Great Peace Shipping} reference was made to a conveyancing case when no implied warranty existed.

The sale of a car with a false odometer in \textit{Devlin v Hall} did not follow \textit{caveat emptor}; instead reference was made to legislation. Similarly legislation was applied in \textit{Thomson v Christie Manson} when an antique was incorrectly described in an auctioneer’s catalogue.

The leading conveyancing cases have not relied at first glance on a cross application of the rule of \textit{caveat emptor}. The court in \textit{Watson v Burton} relied upon a number of authorities in reaching a decision: \textit{Jacobs v Revell} gave authority for rescission and

\begin{thebibliography}{99}
\item Caparo Industries Plc v Dickman [1990] 2 A.C. 605.
\item Canadian Yacht Sales v MacDonald [1977] 2 Lloyds Report 298.
\item Great Peace Shipping Ltd v Tsavliris Salvage International Ltd [2003] Q.B. 679.
\item Trades Description Act 1968, s.1.
\item Misrepresentation Act 1967, s.1(2).
\item Thomson v Christie Manson & Woods Ltd [2004] P.N.L.R. 42.
\item Watson v Burton [1957] 1 W.L.R. 19.
\item Jacobs v Revell [1900] 2 Ch. 585.
\end{thebibliography}
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specific performance regarding misrepresentation and the sale of land; Puckett & Smith’s Contract\textsuperscript{116} was used as authority for misrepresentation; and the \textit{obiter dictum} comments of Viscount Haldane’s judgement in Rutherford\textsuperscript{117} concerned compensation and an order for specific performance. Whittemore \textit{v} Whittemore\textsuperscript{118} was decided in relation to misrepresentation. Gordon \textit{v} Selico Ltd\textsuperscript{119} concerned fraudulent misrepresentation and concealment, reliance was placed on legislation\textsuperscript{120} and other similar cases regarding defective premises and fraudulent misrepresentation. Taylor \textit{v} Hamer\textsuperscript{121} relied on authority for fraudulent representations\textsuperscript{122} and false and fraudulent declarations.\textsuperscript{123}

The only cross application of \textit{caveat emptor} in the numerous cases investigated is Sykes \textit{v} Taylor-Rose\textsuperscript{124} which referred to the Maritime Insurances Act\textsuperscript{125} that requires full disclosure by the assured to the insurer of every material circumstance prior to the contract being concluded and failure may lead to the insurer avoiding the contract.

Investigations have highlighted that apart from rare and subtle applications, decisions involving the rule of \textit{caveat emptor} do not refer to previous judgements involving the rule in other areas of the law and cross reference of application is not made. Sometimes, and not always, if the facts of the case or principles of law are similar previous judgements relating to the same area of law may be referred to.

\textit{ii) The practical effect of \textit{caveat emptor} upon the conveyancing process}

Compared with other forms of property, land has always occupied a peculiar position in English law.\textsuperscript{126} Conveyancing may be regarded as the application of the law of real property in practice,\textsuperscript{127} and essentially concerns the law relating to the creation and transfer of estates and interests in land.\textsuperscript{128} A solicitor investigates title to property, prepares and inspects legal documents on behalf of the client. The process is more complex for unregistered land, which is one reason why the concept of registration was introduced.\textsuperscript{129}

This legislation, in attempting to simplify the transfer of land by easing the burden on purchasers without unfairly defeating the interests of others, dramatically limited the application of the rule of \textit{caveat emptor} on the conveyancing process, which survived

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\textsuperscript{116} Re Puckett & Smith’s Contract [1902] 2 Ch. 258.  \\
\textsuperscript{117} Rutherford \textit{v} Actor Adams [1915] A.C. 866.  \\
\textsuperscript{118} Whittemore \textit{v} Whittemore [1869] L.R. 8 Eq. 603.  \\
\textsuperscript{119} Gordon \textit{v} Selico Ltd [1986] 18 H.L.R. 219.  \\
\textsuperscript{120} Housing Act 1974, s.125.  \\
\textsuperscript{121} Taylor \textit{v} Hamer [2003] 1 P. & C.R. D.G. 6.  \\
\textsuperscript{122} Pearson & Son \textit{v} Dublin Corp [1907] A.C. 351.  \\
\textsuperscript{123} Lazarus Estates Ltd \textit{v} Beazley [1956] 1 Q.B. 702.  \\
\textsuperscript{124} Sykes \textit{v} Taylor-Rose [2004] 2 P. & C.R. 30.  \\
\textsuperscript{125} Maritime Insurances Act 1906, Chapter 41 s.18.  \\
\textsuperscript{129} Law of Property Act 1925.  \\
\end{flushright}
in part by evolving. The 1925 Act provided a definition of land\textsuperscript{130} and s.1 limited the number of legal estates to be held in land to two and also limited the number of legal classes to five. Together with the requirements of the original Land Registration Act,\textsuperscript{131} the onus was no longer entirely on the purchaser to establish title to property intended to be purchased.

The impact of the rule of \textit{caveat emptor} upon professionals working within the property buying industry varies. Solicitors are instructed by either the vendor or purchaser of the property to act on their behalf in the transfer of land. Consideration of unregistered conveyancing and registered conveyancing must be separated in order to recognise the differing impact of the rule, although all conveyances are required to be completed by deed.\textsuperscript{132}

Unregistered conveyancing is self perpetuating.\textsuperscript{133} On a sale of unregistered land the purchaser’s solicitor investigates title, based on the assessment of the vendor’s title in consideration of the draft documents sent by the vendor or solicitor. The purchaser’s solicitor will peruse the original documents, in past practice usually at the time of completion. Undertakings of authenticity will usually be given so the purchaser’s solicitor can rely on the draft documentation to enable the transaction to proceed expeditiously. Whilst verifying these documents the purchaser’s solicitor will raise enquiries to the vendor’s solicitor which must be answered honestly to avoid liability, as seen in \textit{Taylor v Hamer}.\textsuperscript{134} The replies to enquiries may be satisfactory or give rise to additional enquiries and together with the draft documentation supplied by the vendor will form part of the draft contract of sale that the purchaser’s solicitor prepares. A few days prior to completion the purchaser’s solicitor must again search the Land Charges Register to ensure an interest has not been registered post exchange of contracts. A search of the Land Registry Parcels Map will also be made to ensure the land sold is not already part of a registered title.\textsuperscript{135} The purchaser’s solicitor must not rely on investigations carried out on behalf of someone else.\textsuperscript{136} For example a recently aborted sale or the vendor’s own enquires raised on purchase. \textit{Caveat emptor} is prevalent and responsibility lies with the purchaser and solicitor to investigate title until satisfied and then assess the conditions of title prior to proceeding to a binding exchange of contracts. Any oversights may dramatically affect the value of the land purchased and unless misrepresentation can be established as false or fraudulent the only redress for a purchaser would be to establish the negligence of the solicitor.\textsuperscript{137}

Registered conveyancing still involves the vendor’s solicitor submitting documentation to the purchaser’s solicitor and raising contractual enquiries. The difference is that although investigations as to title and equitable unregistered interests

\begin{itemize}
\item \textsuperscript{130} Ibid, s.205(ix).
\item \textsuperscript{131} Land Registration Act 1925, since replaced by the Land Registration Act 2002.
\item \textsuperscript{132} Law of Property Act 1925, s.52(1).
\item \textsuperscript{134} \textit{Taylor v Hamer} [2003] 1 P. & C.R. DG6.
\item \textsuperscript{137} \textit{Cottingham v Attey Bower & Jones} [2000] P.N.L.R. 557.
\end{itemize}
will be made to the vendor’s solicitor, the Land Registry registers will identify the land to be sold and any interests registered. The only potential risk to certainty of title would be an unregistered title, although the purchaser would take the property free of this interest providing it was not obvious on inspection or disclosed on enquiry or has been overreached, where the purchase price is paid to at least two trustees of the legal estate, as occurred in *City of London Building Society v Flegg*.\(^\text{138}\)

The Land Registration Acts\(^\text{139}\) have restricted the rule of *caveat emptor* and following the implementation of compulsory registration\(^\text{140}\) in England and Wales as of 1\(^\text{st}\) December 1990, the rule will continue to be restricted. Ruoff\(^\text{141}\) considers the question of non-disclosure in the case of registered land simply does not arise. Referring to Diplock L.J. in the *Dances Way Case*,\(^\text{142}\) there are mandatory provisions requiring most overriding interests to be entered on the register, save squatters rights or rights of occupiers or lessees, which are discoverable by proper inspection and inquiry under the rule of *Hunt v Luck*.\(^\text{143}\)

Unregistered conveyancing will continue until all property has been registered, which is voluntary (but involves cost) or compulsory upon sale. The Land Registry\(^\text{144}\) has estimated that one per cent of land in England and Wales may remain unregistered for up to eighty years.

A purchaser will often buy property with the assistance of a loan, usually a mortgage, and to save additional expense the purchaser’s solicitor will frequently represent the mortgagee in executing the mortgage. The mortgagee will have an interest\(^\text{145}\) in the certainty of the title to the property and some or all of the pre-completion searches may be carried out by the solicitor acting at this stage on behalf of both the mortgagee and the purchaser.

An adverse interest can affect the value of property which is also of concern to the mortgagee should repossession be necessary, and an overriding equitable interest can prevent the mortgagee regaining possession. This occurred in *Williams & Glyn’s Bank v Boland*.\(^\text{146}\) Mrs Boland had acquired an interest in her husband’s property which had registered title, by contributing to the purchase price, hence becoming a beneficiary under a resulting trust. Mr Boland mortgaged the property, in which they both lived, and used the money for his business. The business failed and the mortgagee sought to gain possession of the property to repay the monies owed. As Mrs Boland had an equitable interest in the property and was in actual occupation at the time the mortgage was granted she had an overriding interest that defeated the bank’s claim. However, the mortgagee could seek a bankruptcy order and a trustee in bankruptcy


\(^{139}\) Land Registration Act 1925, since replaced by Land Registration Act 2002.

\(^{140}\) SI 1989/1347.


\(^{142}\) *Re Dances Way, West Town, Hayling Island* [1962] Ch. 490.

\(^{143}\) *Hunt v Luck* [1902] 1 Ch. 428.

\(^{144}\) 2 Conveyancing standing Committee Report (1985).

\(^{145}\) Law of Property Act 1925, s.1(2)(c).

\(^{146}\) *Williams & Glyn's Bank v Boland* [1981] A.C. 487.
would have the power to sell the husband’s interest and force possession. Accordingly this may only be a mechanism to gain time.

The interests of the mortgagee can be affected as a third party by the rule of *caveat emptor*; the mortgagee must rely on the diligence of the purchaser (also the mortgagor) and the representative solicitor, frequently acting on behalf of both parties. The surveyor also represents the mortgagee when inspecting and valuing the property, whether a basic inspection is being carried out on behalf of the mortgagee or a full survey on behalf of the mortgagee and the purchaser.

Surveyors have been used to escape of the rule of *caveat emptor* by purchasers and mortgagees. A purchaser may seek to rely on the surveyor to establish the condition of a property, and more importantly the surveyor’s professional indemnity insurance. This would involve a negligence claim and issues have arisen when a basic inspection has been carried out on behalf of the mortgagee yet the purchaser has sought to rely on this report, as occurred in *Smith v Eric Bush*[^147] where the purchasers successfully brought a claim against the surveyor. In *Speshal Investments Ltd v Corby Kane Howard Partnership Ltd*[^148] a surveyor was liable to the mortgagee for negligent valuations on property.

Estate agents have long relied on the rule of *caveat emptor* as their authorisation to use poetic licence to embroider descriptions of property. To a certain extent this has been tempered which will be discussed later. Concentration will first be given to the direct correlation between estate agents and the rule.

An agent is defined as a legal relationship under which one person (the agent) acts on behalf of another (the principal).[^149] John Murdoch[^150] recognises the strange position that estate agents occupy with regards the general law of principal and agent. Unless given express authority, they do not have the power to make binding contracts of sale between their client and a third party. However, estate agents have been held liable to their clients for breach of fiduciary duties,[^151] failure to exercise reasonable care and skill,[^152] or the unauthorised appointment of sub-agents.[^153] Estate agents have also been held liable to third parties for negligent misrepresentation. In *Dodds v Millman*[^154] the estate agent was held liable to an inexperienced purchaser for statements made that were grossly negligent.

In *Hatlelid v Sawyer McClockin Real Estate*,[^155] an estate agent prepared particulars which were given out, claiming the garage of the property would take two cars. The purchaser’s wife inspected the property including the garage and made no comment with regards the size of the garage, which was too small for two cars. The rule of *caveat emptor* was held to apply, and although the estate agent may have made a

[^148]: *Speshal Investments Ltd v Corby Kane Howard Partnership Ltd* [2003] WL 1822998.
[^151]: *Andrews v Ramsay* [1903] 2 K.B. 635.
[^153]: *John McCann & Co v Pow* [1975] 1 All ER 129.
[^154]: *Dodds v Millman* [1964] 45 DLR (2d) 472.

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misrepresentation, the purchaser had relied on the inspection and therefore could not recover damages.

iii) Attempts to restrict the rule of caveat emptor

Post-1945, the desire for home ownership has become a reality for an increasing proportion of the population of England and Wales. This desire was encouraged following the election of the Conservative Government in 1979 and the implementation of the right to buy council property that the tenant occupied at a discounted price.156

This increase in property transactions has caused attempts to regulate the home buying process. Estate agents are heavily criticised, especially in the media, and in 1979, the Estate Agents Act 157 was passed to regulate the process. An estate agent was not given any definition; instead estate agency work was defined. The ultimate penalty for breaching the Act was the order preventing “unfit persons from carrying out estate agency work,”158 to be regulated by the Office of Fair Trading.

The National Association of Estate Agents is a self-regulatory body with over 10,000 members.159 Established to provide professionalism within high street estate agency. It is hoped that a high level of service will be offered by its members as a breach of the codes of practice and professional rules of conduct could lead to a member being fined or even excluded from membership. However membership of this association is voluntary and without legal enforcement. The OEA also regulates its members, although subject to a fine for breaching regulations, membership is not compulsory and a delicate balance exists between fines imposed and members withdrawing their membership.

Under the umbrella act of the Estate Agents Act 1979,160 the Property Misdescriptions Act 1991161 was introduced to allay fears that the public were being misled and to regulate the mechanics of how estate agents described property. The Act became effective in March 1993, and adopts the definition of estate agency work from the 1979 Act. It an offence to make a “false or misleading statement about a prescribed matter.”162 Prescribed matters were introduced under the Act and the Property Misdescriptions (Specified Matters) Order 1992,163 and a breach may lead to criminal liability (legislation provided no civil remedy) of the employee and/or employer. As the legislation is within the 1979 Act, a conviction can result in the prevention of “unfit persons from carrying out estate agency work.”164

When the Act was first introduced estate agents were apprehensive and Trading Standards, who police the provisions of the Act, were vigilant. Property particulars

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156 Housing Act 1985.
158 Ibid, Chapter 38, s.3.
159 www.naea.co.uk
162 Ibid, s.1.
164 Estate Agents Act 1979, Chapter 38, s.3.
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became scant and phrases including “in the writer’s opinion” were introduced. With the advent of digital photography, the Act allows flattering photographs to be taken (though they must not be doctored), and the introduction of floor plans, expansive descriptions are no longer required and a more relaxed approach is taken unless a serious complaint is made or an estate agent flouts the law.

The 1991 Act provides that anyone could complain to Trading Standards. Situations arose where people who might not intend to purchase the property complained or even Trading Standards brought actions without the prior requirement of complaint. Sometimes if a complaint was made against an estate agent who had breached the Act in providing a false or misleading statement, there followed an offer to correct the misdescription. This clearly was not the intention of the legislation and together with the defence of due diligence, which over time has become apparent what Trading Standards allow to constitute as much, the Property Misdescriptions Act is not as feared and has not had the impact it was once thought it would have.

The Financial Services Act was introduced to regulate the financial services industry. There was concern following adverse media coverage in the 1980s that some estate agents were being selective at putting offers to vendors. It was claimed to occur more often when an estate agent was owned by or aligned to a financial services provider. The result is that estate agents use the legislation to their own advantage, claiming the need to qualify offers prior to presenting them to a vendor, which presents the opportunity to sell financial services to the client.

In March 1990, the NCP was introduced, the fifth edition took effect in October 2004. A system of standard provision has existed for centuries, Thomas Martin in his Practice of Conveyancing 1837 gave examples of such books from as far back as The Chartuary 1534 and Dr Phayer’s Boke of Instruments in 1543. Often earlier publications related to the drafting of deeds but W.T. Williams in 1780, included an agreement for the sale of a freehold estate. The Law Society introduced standard conditions to coincide with the implementation of the Law of Property Act 1925, which took effect on 1st January 1926. By the 1970s there was much criticism that the modern conveyancing procedure was completely out of hand and Thompson claims it then worsened.

The Law Society introduced the NCP, called TransAction, with a view to speeding up the conveyancing process. The longer a transaction took to complete the more chance that it would abort, leaving solicitors and estate agents with lost business and purchasers and vendors with expense and disappointment. Abbey and Richards acknowledge that solicitors themselves were unfairly blamed for delay and the main

166 Financial Services Act 1986, since repealed by SI 2001/3649 (Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order), Pt 1 Art 3 (1) (c).
168 W.T. Williams, Original Precedents in Conveyancing (1780).
169 [1970] 34 Conv (NS) 224.
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culprit were the local authorities in slowly processing local authority searches during the property boom years of the 1980s.

Solicitors are required at the beginning of a transaction to confirm whether they are to proceed under the requirements of Protocol. The Law Society recommends the use of Protocol in all domestic transactions, although in practice the vendor paying for the local authority searches is excluded as this is often seen as a barometer for a purchaser’s commitment.

The SPIF is a useful instrument to save time as it answers many questions likely to be raised on enquiry and if completed early on in the transaction can save considerable time in the process. Part I is to be completed by the vendor and Part II by the vendor’s solicitor. Additional enquiries may be raised by the purchaser’s solicitor but this form has reduced those enquiries.

Inaccurate completion of the SPIF, or inaccurate replies to enquiries, allow a purchaser to seek a remedy under the Misrepresentation Act 1967. This enables a person who enters into a contract after a misrepresentation has been made by another person and loss is suffered, to obtain damages if the misrepresentation had been made fraudulently.

The approach of the courts to inaccurate completion of SPIF has tightened. During the 1990s, when the property market recession created many repossessions, accurate completion was often impossible when repossessions were being sold and the mortgagee had no personal knowledge of the property. The claimant in the case of Sykes v Taylor-Rose relied heavily on the completion of the SPIF. Emma Slessenger claims that following this case some conveyancers are now asking specific additional questions about serious crimes committed at the property being purchased. In Taylor v Hamer reliance was given to the fraudulent replies to enquiries given by the vendor. In McMeekin v Long, it was held that the vendor had made a fraudulent misrepresentation in completion of the SPIF when stating there were no disputes with neighbours when clearly there were, and the vendor knew the purchaser would rely on the information given.

The importance of NCP, in particular the introduction of the SPIF has dramatically limited the ability of the vendor relying on the defence of caveat emptor, especially when a fraudulent misrepresentation is made. It must be noted that the adoption of TransAction in a property transfer is not mandatory and at the discretion of the vendor and purchaser’s solicitor. An unscrupulous vendor would ensure that NCP was not used to allow reliance upon caveat emptor.

The rule of caveat emptor applies in varied form to a building under construction. As the purchaser would not have the opportunity of inspection, the common law implied a threefold warranty on the builder; to work in a good manner, to supply good and
proper materials and finally to ensure the property is fit for human habitation.\textsuperscript{177} This was further enhanced by legislation when in January 1974 the Defective Premises Act\textsuperscript{178} took effect. The NHBC Certificate, places a contractual obligation on the builder, underwritten by the NHBC and is generally required by mortgagees. This provides redress to a purchaser under certain circumstances which limits the rule of \textit{caveat emptor}.

Media pressure has played a part in encouraging reform for professionals working within the home buying industry. There have also been numerous Government committees, for example the Farrand Committee,\textsuperscript{179} which considered reforms of the conveyancing process.

In conclusion, \textit{caveat emptor} can have a major effect on the home buying process, and despite the introduction of procedures and even legislative direction, the home buying process remains largely un-codified and it thus exposes purchasers to the peril of \textit{caveat emptor} and its consequences. Thus a prudent purchaser should instruct a solicitor and other professionals to protect his/her interests. The conveyancing process in many ways reinforces the rule of \textit{caveat emptor}, albeit with qualification.

**The Content of Part V of the Housing Act 2004**

This chapter will consider why legislation has been implemented and will then review the content of Part V of the Housing Act 2004, before establishing the current status and proposed implementation of HIPs. Attention will then shift to the practical effect HIPs will have upon professionals working within the conveyancing process.

Much of the impetus for change was generated by the Conservative Government during the early 1980s, anxious to extend home ownership.\textsuperscript{180} The need for reform gained momentum alongside the desire to own a property, which during the property boom years of the 1980s resulted in many people left to the peril of the property market and those professionals who worked within it. Early calls for reform include the Conveyancing Standing Committee of the Law Commission\textsuperscript{181} who issued a Working Paper on \textit{Caveat Emptor} in Sales of Land and made the preliminary suggestion; “a vendor of land should be under a positive duty to disclose all material facts about the property he is selling, providing he is aware of those facts or ought reasonably to be aware of them. To this significant extent the \textit{caveat emptor} rule should be reversed.” The Report, ‘Let the Buyer be Well Informed’\textsuperscript{182} disagreed with this approach and felt there was significant reasoning to uphold the rule.

The election of the Labour Government in 1997 brought a desire for change together with the recognition of public dissatisfaction with the home buying process. In the

\textsuperscript{178} Defective Premises Act 1972.
\textsuperscript{179} ‘The Scope For Simplifying Conveyancing Practice and Procedure’, 2 Report.
\textsuperscript{181} The Conveyancing Standing Committee of the Law Commission 1988.
\textsuperscript{182} ‘Let the Buyer be Well Informed’ [1990] Conv 137.
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2001 election, the Labour Party’s manifesto included a clear commitment to ‘make it easier for people buying and selling homes through a new seller’s pack.’\textsuperscript{183}

The Deputy Prime Minister, John Prescott, introduced the Housing Bill into Parliament on 8\textsuperscript{th} December 2003, which included the proposal for HIPs. The Housing Act came into force on 17\textsuperscript{th} November 2004, and Part V of the Act, ss.148-178, provide for the introduction of HIPs. The precise implementation date has been subject to delay.

A HIP is “a collection of documents relating to the property or the terms on which it is or may become available for sale.”\textsuperscript{184} The legislation applies only to some residential property, not commercial property, and homeowners or their selling agents are required to have prepared a HIP when marketing the property for sale, a copy must be made available to prospective purchasers on request.

The ‘responsible person,’\textsuperscript{185} compiles the HIP, and is the person who markets the property, namely the vendor or the person acting as the vendor’s estate agent. The definition of ‘acting as an estate agent’ will include the activities of solicitors, s.150(1) provides, a person acts as estate agent for the seller of a residential property if he does anything, in the course of a business in England and Wales, in pursuance of marketing instructions from the seller. S150(3) concludes it is immaterial for the purposes of this section whether or not a person describes himself as an estate agent. The person must be acting in the course of a business and “marketing instructions” include selling a property by auction or tender.\textsuperscript{186}

The obligation to supply a copy of the HIP or specified documents, does not apply where the ‘responsible person’ believes that the person making the request; is unlikely to have sufficient means to buy the property; is not genuinely interested; or is not a person the vendor would be prepared to sell to (though this cannot amount to unlawful discrimination). The duties do not apply in relation to a residential property at any time when it is not available for sale with vacant possession,\textsuperscript{187} unless there are two or more dwellings in a sub-divided building being sold as a single property.\textsuperscript{188}

The content of the HIP is controlled as regulations dictate the required documents\textsuperscript{189} which must be included and authorised documents\textsuperscript{190} whose inclusion is recommended. Generally all official documents must be original versions or true copies. On 19\textsuperscript{th} July 2006, Yvette Cooper, Local Government Minister, issued a statement withdrawing the home condition report as a required document, it instead became an authorised document.

A HIP must now comprise; searches, other property related documents and an energy efficiency certificate. The HIP must be available before ‘the first point of marketing,’

\textsuperscript{184} Housing Act 2004, s.148(2).
\textsuperscript{185} Ibid, s.151.
\textsuperscript{186} Ibid, s.150(2)(b).
\textsuperscript{187} Ibid, s.160(1).
\textsuperscript{188} Ibid, s.171(2).
\textsuperscript{189} The Home Information Pack Regulations 2007, 9 (a)–(m).
\textsuperscript{190} Ibid, 10 (a-p).
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effectively when the duty arises under s.155(1)\textsuperscript{191}. Any official documents must not be more than three months old\textsuperscript{192} and other documents must be the most recent available. Some limited items may be omitted if they are unobtainable. Finally, if the ‘responsible person’ is not the vendor, the vendor must be provided with a copy of the HIP in order for the contents to be verified.

Exceptions to the duty of providing a HIP exist, for example; business premises and business use, mixed sales, portfolios of properties and unsafe properties and demolition. Enforcement of the duty to provide a HIP will be carried out by the local weights and measures authority (s.166\textsuperscript{193}) and in the event of a breach a penalty charge of £200 can be issued.\textsuperscript{194} Trading standards officers should also be able to notify the Office of Fair Trading of breaches by estate agents which could trigger action under the Estate Agents Act 1979\textsuperscript{195} and potential liability in a civil action is also a consideration. The trial of HIPs in six locations; Southampton, Newcastle, Northampton, Bath, Huddersfield and Cambridge, commenced on Monday 6\textsuperscript{th} November 2006.

Consideration must now be given to the effect of the requirement of HIPs on professionals working within the conveyancing process. Solicitors should be aware that HIPs will transfer the responsibility for obtaining local searches from the purchaser to the vendor, a similar approach to TransAction. The requirement will become mandatory and not capable of exclusion. Solicitors will need to verify HIPs prepared by or for their clients when a sale is agreed and need to consider their administration, especially updating the content of standard letters.

The most significant effect on solicitors will be when they represent a vendor who has agreed a sale on their own property without using the services of an estate agent. The definition of an estate agent is given above and solicitors generally do not fall within it, however under Part V of the Housing Act 2004 they do when representing a vendor who has found a purchaser privately.

In February 2007, the DTI approved the OEA application to run a redress scheme under the Housing Act\textsuperscript{196} to deal with complaints against estate agents in the provision of HIPs. In March an order for The HIP (Redress Scheme) 2007\textsuperscript{197} was laid before Parliament. Estate agents who wish to provide HIPs must belong to a approved redress scheme and this requirement applies only to estate agents that undertake ‘estate agency work’ as defined in the Estate Agents Act.\textsuperscript{198}

Large firms of estate agents may decide to provide HIPs free of charge (likely to be conditional), which would alleviate the vendor of the financial requirement, but would give large firms, often supported or owned by financial institutions, a position of unfair advantage. Lord Rooker stated “the introduction of HIPs will enhance the role

\textsuperscript{191}Housing Act 2004.
\textsuperscript{192}The Home Information Pack Regulations 2007, 15& 16.
\textsuperscript{193}Housing Act 2004.
\textsuperscript{194}The Home Information Pack Regulations 2007, 35.
\textsuperscript{196}Housing Act 2004, s.172.
\textsuperscript{197}Home Information Pack (Redress Scheme) 2007 No. 560.
\textsuperscript{198}Estate Agents Act 1979.
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for estate agents in the home buying and selling process . . . this will put agents in a central and highly influential position.199

The removal of the mandatory need of the home condition report has allayed many criticisms of the HIP. A purchaser would in most cases instruct their own survey of the property which would allow redress in the instance of negligence on the part of the surveyor. Originally, it was hoped that mortgagees would accept the home condition report carried out on behalf of the vendor, for the purchaser when a sale was agreed and a mortgage required. On 31st January 2006, the council of Mortgage Lenders Director General, Michael Coogan, said “the government must . . . work to dispel the myth that the home condition report element of the pack will stop the need for lender valuations. This is simply incorrect and sends out a confusing message to consumers.”200 The use of a home condition report would unnecessarily add to costs as at least two surveys would be carried out and each may reach differing conclusions. A purchaser’s adverse survey defeats in part one of the objects of the implementation of HIPs; “better buying; simpler selling.”

The vendor will have to bear the additional cost of the searches, and producing the HIP, which is estimated at approximately £600 (plus VAT).201 This figure excludes the cost of a home condition report, which are likely to become required documents again at some time in the future. The vendor will be responsible for preparing a HIP if choosing not to use the services of an estate agent and if an estate agent’s services are engaged, the vendor must verify the HIP. Case law will decide the onus expected of a vendor.

The essential impact that can be observed is in a rising property market, where property prices are out of the reach of many potential purchasers, requiring such outlay of a vendor may prevent the potential vendor who is just considering or contemplating marketing their home, from testing the market. This will lead to fewer properties coming to the market and therefore a lower supply of property thus pushing property prices even further. The effect for a purchaser will essentially be the possibility of higher property prices, although they are likely to enjoy the lower transaction costs of buying and the availability of information prior to committing to making an offer on a property.

The Effect of Part V of the Housing Act 2004 in Relation to Caveat Emptor

The Law Society recognises the need for independent advice and has warned that a crucial ‘health warning’ should be given with all HIPs,202 which Parliament did not heed. The Deputy Prime Minister’s Office stated that HIPs will have the effect of “making the home buying and selling process more transparent, more certain and consumer friendly.”203 Consideration will now be given to ascertain if this is the case or if there will be instances of conflict with the rule of caveat emptor.

199 Hansard, House of Lords Debates, 16 September 2004, Column 1295.
200 www.cml.org.uk
202 Ibid.
203 www.odpm.gov.uk
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Vacant possession is the first consideration and the provisions of the 2004 Housing Act. Section 160 concerns residential properties without vacant possession, and states; (1) the duties under ss.155-159 do not apply in relation to a residential property at any time when it is not available for sale with vacant possession. S.148(1) defines a residential property as premises in England and Wales consisting of a single dwelling-house, including any ancillary land.

The interpretation of these sections may be ambiguous. In reality many properties do not offer vacant possession until completion. A property may have tenants or the owner occupier in situ who will not vacate the premises until completion. With regards to owner occupiers, this is invariably the case as they will often use the proceeds from the sale of their existing property to fund in full or part the next property purchase. Does s.160 therefore suggest that the use of HIPs applies only to property offering vacant possession at the time of marketing? This surely is not the intention and is an anomalous situation that creates a legal loop-hole and will require adjusting or interpreting at some future date as it may provide a defence to the non-use of HIPs.

A further consideration regarding vacant possession relates to the doctrine of notice, an equitable doctrine. Prior to completion, and immediately prior is in some instances most appropriate, otherwise close to completion and usually once a binding exchange of contracts has been effected, the property should be inspected. Primarily this will verify who is in actual occupation, as the existence of a third party occupant may amount to an overriding interest which would bind the purchaser, as in Williams & Glynn’s Bank Ltd v Boland.

A final inspection may uncover a tenant who has rights of occupation, including an option to purchase, although today registration would govern enforceability. A person can have rights of occupation even where an interest was not apparent on an earlier inspection due to holidays or hospitalisation.

Whether the property is registered or unregistered, the courts have applied the principles of Williams & Glynn’s Bank Ltd v Boland, a registered land case, to unregistered land in relation to s.70(1)(g) Land Registration Act 1925, the rights of persons in actual occupation. Oliver J stated in Midland Bank Ltd v Farmpride Hatcheries Ltd “a purchaser who is put on notice that someone other than the vendor himself is in occupation of the property sold, either because he actually knows of such occupation or he does not bother to inspect the property, has constructive notice of the occupier’s interest if he does not bother to enquire what it is.” The purchaser needs to make enquiry of such an interest, and those rights need not be disclosed for the equitable overriding interest not to bind the purchaser, supported by s.199 Law of Property Act 1925.

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205 Williams & Glynn’s Bank Ltd v Boland [1981] AC 487.
206 Daniels v Davison [1809] 16 Ves. 249.
207 Chhokar v Chhokar [1984] FLR 313, CA.
208 Williams & Glynn’s Bank Ltd v Boland [1981] AC 487.
209 Replaced by Land Registration Act 2002, ss11(2)-(4).

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The equitable interest of a spouse must be distinguished from a spouse’s statutory right of occupation,211 which must be protected by a class F land charge or a notice if the title is registered. Problems often occur where a spouse or partner has no legal interest in the property being sold, but has an equitable interest.

A pre-completion inspection may identify a tenant, either not known of previously or recently installed, whose interest may be overriding, or a licensee, although usually 28 days notice will terminate any such agreement.212 In the meantime the purchaser may still be affected by this interest. Alternatively, the property may have squatters, which although subject to the strict requirements of the Land Registration Act 2002, may have an adverse effect on the property and is likely to cause the purchaser to incur costs whilst an application for their removal is made.

It is prudent for a purchaser to ensure an equitable overriding interest does not exist on a property about to be purchased, prior to completion especially if there is reason for concern. For registered land, it is the person in occupation at the time of completion of the purchase who may have an overriding interest binding on the purchaser.213 The rule of caveat emptor applies to an overriding equitable interest which is often difficult to identify and ascertain this position has not been simplified by the HIPs and indeed flies in the face of the objective “better buying, simpler selling.”

A final inspection may also provide the purchaser an opportunity to verify replies to contractual enquiries and consider the fixtures and fitting document, if provided by the vendor. A new property should also be physically inspected prior to completion to confirm the property is ready for occupation and to produce a ‘snagging list’ of any minor imperfections requiring attention.

Failure to remove fittings, or chattels, on completion can also have a detrimental effect to vacant possession being obtained. Land is defined as; land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way).214

A fixture can be defined by the degree of annexation test,215 the purpose of annexation test216 or the modern approach as ‘part and parcel of the land’217 and as such should remain on completion. The implementation of a fixture and fittings document as part of the SCOS has in many instances alleviated the issues whether something was a fixture or a fitting and therefore whether it should remain as part of the land or be removed prior to completion.

The non-removal of a fitting may certainly not be in the purchaser’s interest or desire. In Cumberland Consolidated Holdings Ltd v Ireland,218 the plaintiff agreed to buy

211 Matrimonial Homes Act 1983.
214 Law of Property Act 1925, s.205(ix).
218 Cumberland Consolidated Holdings Ltd v Ireland [1946] K.B. 264.

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from the defendant a warehouse that was sold “with vacant possession on completion.” The cellars were full of rubbish including bags of cement that had gone hard, the defendant undertook to remove the rubbish, but upon completion only some had been removed and the greater part, including the bags of cement, remained. The amount of rubbish remaining on completion was sufficient to detrimentally affect the value of the property as the cellars could not be used as intended. It was held that the plaintiff was entitled to damages because the rubbish prevented vacant possession being given upon completion. Similarly in Norwich Union Life Insurance Society v Preston leaving furniture in a house constituted failure to give vacant possession.

Despite the SCOS and the HIP, a purchaser should make a pre-completion inspection. Any fittings and chattels remaining at the property on completion may, if affecting the substantial part of the property, prevent vacant possession being obtained.

Equity’s darling, the bona fide purchaser for value of the legal estate, who takes free from any equitable interests, of which he does not have notice of, exists mainly in unregistered land and the effect has been limited by the 1925 legislation. However, an equitable interest can arise which will bind a purchaser and in these instances the rule of caveat emptor will still apply. The impact this rule has on HIPs will certainly occur regarding vacant possession, and consideration will now be given to the other stages of the conveyancing process.

As we have already discussed the requirement of HIPs arises from the first point of marketing and will provide a source of information to prospective purchasers. Once a sale has been agreed and the property is sold, “subject to contract,” the HIP and conveyancing processes conflict. There is no provision for TransAction or SCOS within HIPs and they do not provide all of the information required for the conveyancing transaction. This is likely to lead to instances when information may surprise the purchaser and potentially lead to a withdrawal from the purchase, a re-negotiation of price or at the very least disappointment.

The doctrine of notice will apply and the purchaser will be expected to make enquiries of any overriding and equitable interests which will be binding on completion. Together with other searches and the SPIFs, the purchaser and his solicitor will endeavour to establish the true title of the property and any factors which may affect it.

Upon exchange of contracts, further searches are completed and the purchaser is well advised to re-inspect the property prior to completion to ensure full legal title is known and to ensure an equitable or overriding interest has not arisen since last inspection or exchange of contracts. Otherwise the purchaser may still be bound by any such interest.

Finally, on completion any discrepancies are likely only to be remedied by claims of professional negligence or fraudulent misrepresentation. However, will the implications of the wide definition of the criminal charge of fraud, within the Fraud

219 Norwich Union Life Insurance Society v Preston [1957] 2 All ER 428.
220 Land Registration Act 1925 since replaced by the Land Registration Act 2002.
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Act 2006 allow claims to succeed against professionals working within the home buying industry, notably solicitors and estate agents? Section 1 states that a person is guilty of fraud if he is in breach of any of the sections listed in s.2, which includes fraud by false representation and fraud by failing to disclose information.

A division can be identified within the conveyancing process. The HIP would appear to have the most effect and impact whilst the property is being marketed. However the rule of caveat emptor does conflict with this effect once the sale of a property is agreed.

**Conclusion - Does Part V of the Housing Act 2004 Undermine the Rule of Caveat Emptor?**

The origins of the rule of caveat emptor and its entrance into English law have proved difficult to establish and in the author’s quest and determination to thoroughly research this area of law there was even found to be in existence a science fiction novel titled ‘caveat emptor.’ Support is given to the theory of Hamilton that the rule of caveat emptor entered English legal usage on the back of an excerpt from Fitzherbert, a distinction recognised by Coke, a doctored Latin quotation from statute and support in a number of cases.

The rule became prevalent in English law until the late nineteenth century when legislation was implemented to provide protection to a purchaser of goods. Further legislation tempered the rule, notably the Misrepresentation Act 1967. By this time the rule had become firmly established within the conveyancing process, which has been the focus of this dissertation and despite attempts during the late twentieth century caveat emptor has retained a firm foothold.

Yet, the rule does not show a definitive line of authority and is often relied upon by the courts without direct reference to previous decisions affirming or rejecting the application of caveat emptor. Similarly, cross application of the rule between differing areas of the law is virtually non-existent.

In assessing Part V of the Housing Act 2004, it has been possible to identify anomalies that will require clarification; these include the requirement for the property to offer vacant possession. Also the demands of a solicitor representing the client selling a property without the use of an estate agent may prove onerous. Clearly, estate agents hold the key to HIPs, a profession already viewed with suspicion.

Areas of conflict between HIPs and the rule of caveat emptor have been identified, most notably; equitable interests of a person in actual occupation, the doctrine of notice and the failure to remove fittings upon completion. These conflicts have yet to attract academic comment or Parliamentary recognition and may prove litigious in the implementation of HIPs.

Academic and political comment currently pays attention to the introduction of HIPs and questions the value they will offer in achieving the aim of the legislation; “better buying, simpler selling.” There have been delays and amendments, indeed Mark

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221 Fraud Act 2006.
Prisk, Shadow Minister for Small Business and Enterprise, suggested that within Whitehall there are “whisperings” of further delay to the implementation of HIPs. Which, the consumer association, claims *caveat emptor* will prevail over HIPs, a viewpoint in which this dissertation concurs.

Finally, support is given to Atiyah in considering the foundations of *caveat emptor* were firmly established by a case concerning a ‘magical stone.’ This is of significance when considering the implementation of HIPs by Parliament, yet will take second place to the rule. Constitutional criticism may arise once the issues identified within this dissertation are recognised, for the present the author submits that Part V of the Housing Act 2004 does not undermine the rule of *caveat emptor*.