RE: Central Office of Public Interest
Air-Pollution and the Residential Property Market

ADVICE

A. INTRODUCTION

1. The Central Office of Public Interest CIC ("**COPI**") is a non-profit Community Interest Company formed as a creative industry alliance of people in film, advertising, television and music which aims to raise awareness of issues of pressing concern to society. The growing problem of air-pollution is one such issue, affecting the environment and the public health and, through media campaigning, COPI seeks to bring about a positive change in the public's expectations of better air-quality.

2. COPI has created a website (addresspollution.org) which gives the public the ability to check air-pollution levels at a given postcode and shows the concentration of nitrogen dioxide in the air as compared with the WHO annual limit of 40$\mu g/m^3$. The service is currently limited to London addresses but it is planned to expand the service nationally. Their objective is to ensure that anyone purchasing a property knows the likely pollution levels in the area, so that he or she can properly assess the risks. This in turn, is likely to lead to pressure to reduce pollution, which will be beneficial for public health in general.

3. We are asked to advise COPI as to whether levels of air-pollution have a bearing on aspects of the residential property market, in particular, whether there is any obligation on sellers or their agents to disclose information about local air-pollution levels and whether solicitors and surveyors involved in the conveyancing process are professionally obliged to inquire into or advise upon such matters.

B. BACKGROUND

4. The seriousness and significance of the problem of air-pollution is of relevance to the legal and professional obligations which we discuss in this advice.

5. In that regard, it has for a long time been known that air-pollution is linked to illness and early deaths. However, it was only at the end of 2020 that a coroner, for the first time in this jurisdiction, found that a death from asthma had been "*contributed to by exposure to excessive air-pollution*"[1]. This was in the inquest into the death of Ella Roberta Adoo Kissi-Debrah, a nine-year-old girl.

---

1. https://www.innersouthlondoncoroner.org.uk/news/2020/nov/inquest-touching-the-death-of-ella-roberta-adoo-kissi-debrah

C. SUMMARY

6. We have considered various possibilities for where any obligation may lie to disclose air-pollution levels. It is possible that there are others, which we have not identified. In our view it is arguable that the following obligations arise:

    (a) an obligation on vendors to disclose air-pollution levels where those levels have an effect on title to the land;

    (b) an obligation on vendors not to make misrepresentations or breach the terms of their sale contract as set out below;

    (c) an obligation on solicitors to advise and to make inquiries, for the benefit of purchasers and mortgage lenders;

    (d) an obligation on surveyors when preparing residential property reports; and

    (e) an obligation on estate agents when selling properties, pursuant to Regulation 6 of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) ("the **Regulations**") on the basis that in places where pollution levels are high and pose a risk to health, that is "material information" under the Regulations.

D. DUTIES OF VENDORS

The Legal Framework

7. Vendors and purchases of estates in land (i.e. both freehold and leasehold titles) have obligations towards each other arising from the contract for sale. The basic principle is that the vendor's particulars of sale in the contract must accurately describe the land which he or she intends to convey[2]. That description usually relates to:

    (a) the physical identity of the land;

    (b) the estate to be transferred;

    (c) property rights enuring for the benefit of the land; and

    (d) incumbrances, which burden the land.

8. Sale contracts for residential sales by private treaty are usually in the form[3] provided by The Law Society for the use of solicitors. That form incorporates both standard conditions and a section into which parties may insert agreed special conditions more suited to their particular conveyance.

9. Clause 3 of the 5th Edition of the Standard Conditions of Sale defines the condition of the property being sold and concerns the physical state of the property and the matters affecting title described above.

---

2. *Swaisland v Dearsley* (1861) 29 Beav 430 at 436. See also *The Law of Real Property*, Megarry and Wade, 9th Ed. Ch. 14.

3. https://www.lawsociety.org.uk/en/topics/property/standard-conditions-of-sale

10. It is unlikely in our view that the Standard Conditions of Sale themselves could ordinarily be interpreted as placing any obligation on vendors to disclose environmental matters such as air-pollution.

11. However, standard clause 7 refers to "*... any ... statement ... in the negotiations leading to [the contract]*" which was "*misleading or inaccurate...",* where there is a material difference between the "*description ... of the property ... as represented and as it is*". The clause potentially gives rise to actionable rights, namely specific remedies for breach of contract and, depending on the type of breach of contract, parties may be entitled to damages or to "rescission" (unwinding of the contract to place the parties in the position they would have been in pre-contract). This may be of significance in relation to air-pollution levels, as explained further below.

7. REMEDIES

7.1 Errors and omissions

7.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission by the seller, the remedies available to the buyer are as follows.

(a) When there is a material difference between the description or value of the property, or of any of the contents included in the contract, as represented and as it is, the buyer is entitled to damages.

(b) An error or omission only entitles the buyer to rescind the contract:

(i) where it results from fraud or recklessness, or

(ii) where he would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect.

7.1.2 If either party rescinds the contract:

(a) unless the rescission is a result of the buyer's breach of contract the deposit is to be repaid to the buyer with accrued interest

(b) the buyer is to return any documents he received from the seller and is to cancel any registration of the contract.

12. The pre-contractual representations as to the description of the property not only have a direct relevance to a claim for breach of the express provisions clause 7, but also as to a claim under The Misrepresentation Act 1967, which also entitles a contracting party to damages or to rescission. The two types of claim are not mutually exclusive because, by s.1(a) of that Act, a misrepresentation remains actionable even though it has become a term of the contract.

13. In simple terms, a party may seek to claim compensation and/or to refuse to complete if the property has been misdescribed. It is important therefore to consider the nature of representations made and what duties the law imposes on vendors as to the disclosures they make during a conveyance.

Disclosure Generally

14. Contractual disclosure obligations differ based on the type of contract involved. Insurance policies, for example, provide cover based on fuller disclosure by policy-holders because they are (at least in general terms) contracts "of utmost good faith" (*uberrimae fidei)* such that failure to disclose a material fact may lead to cover being declined.

15. Contracts for the sale of land, however, do not fall into the same category in the sense that there is no general obligation to make full disclosure of all material facts– instead they are subject to the general rule of "buyer beware" (*caveat emptor*). This means that the purchaser is expected to make all reasonable enquiries and to bear the risk of failing to do so. So, for example, the court held in

Sykes v Taylor-Rose[4] that there was no obligation on a vendor to disclose that the property to be sold had been the site of a gruesome murder.

Defects in Title

16. There are exceptions to *caveat emptor*. In particular, in relation to the quality of the title to the land. In that context, for example, pursuant to an implied term under common law[5], the vendor is under a duty to disclose every latent (but not patent[6]) defect in the title of the land as well as being under a fundamental duty to prove his or her title at the date of completion[7].

17. Defects in title would not, in our view, as a matter of general law include environmental matters such as air-pollution in the local area. The more common examples of latent defects in title are the existence of a tenancy[8] which prevents a purchaser making full use of the purchased property or the existence of a restrictive covenant[9].

18. If, however, the property being sold were subject to a covenant in the conveyance, whether restrictive or otherwise, the terms of which concerned environmental matters, including air-pollution, it is conceivable that air-pollution, whether from wider environmental causes, from vehicles near or at the property, or from the use to which the property or adjoining properties are put, could indirectly affect title to the land. The same is true in relation to rights of way or easements over the property, if they relate, for example, to rights across the land to inspect pollution levels, or to carry out remedial work.

19. Covenants frequently appear in conveyances to limit the potential for nuisance to neighbouring properties from the servient land caused by noise or light pollution. As discussed below, Building Regulations make provision for ventilation in the construction of new properties to be located appropriately and it is conceivable that external ventilation of air-pollution is relevant to compliance with the terms of some restrictive covenants.

---

4. [2004] EWCA Civ 299;

5. *Harpum* (1992) 108 L.Q.R. 208, relying on, inter alia, *Carlish v Salt* [1906] 1 Ch. 355 and *Reeve v Berridge* (1888) 20 Q.B.D. 423. The existence of such a duty was accepted by the majority of the Court of Appeal in *Peyman v Lanjani* [1985] Ch. 457, 482, 496–497.

6. Per *Megarry and Wade* at 14-069*: "A defect is not patent merely because the purchaser has constructive notice of it. It must be one "which arises either to the eye, or by necessary implication from something which is visible to the eye". Thus an obvious right of way is likely to be patent, but a tenancy, a restrictive covenant and a local land charge are all latent incumbrances."*

7. *Horton v Kurzke* [1971] 1 W.L.R. 769 at 772 per Goff J

8. *Pagebar Properties Ltd v Derby Investment Holdings Ltd.* [1972] 1 W.L.R.1500.

9. *Re Stone and Saville's Contract* [1963] 1 W.L.R. 163.

20. An example of a covenant in a lease relating to service charges for a residential block of flats from the *Encyclopaedia of Forms and Precedents*[10], is inset below. Depending on the specific wording of the covenant, a tenant may become liable for additional service charges incurred by the freeholder or management company to mitigate the ingress of urban air-pollution.

> *"1.3*
>
> *Plant means all the electrical, mechanical and other plant, machinery, equipment, furnishings, furniture, fixtures and fittings of ornament or utility in use for common benefit from time to time on, in or at the Building, including goods and passenger lifts, lift shafts, escalators, [heating, cooling, lighting and ventilation OR air conditioning] equipment, cleaning equipment, fire precaution equipment, fire and burglar alarm systems, door entry systems, closed circuit television, refuse compactors and all other such equipment, including stand-by and emergency systems."*

21. An example of particular relevance to air-pollution is the 1907 case of *Cable v Bryant*[11]. In 1905 a company sold the plaintiff's land to him with a stable built on it. The stable was ventilated by apertures which were nine inches in height and 2 ft. 9 in. long. The company sold adjacent land to the defendant, who built next to the stable obstructing the apertures, preventing adequate ventilation. The court held, because of the legal doctrine of derogation from grant, that the plaintiff had a right to ventilation which prevented the owners of the adjacent land from building anything on it which interfered with the use of the stable. Per Neville J:

> *"It has been said, first of all, that the right to air is different in its nature from the right to light, and cannot be granted as an easement at all. Secondly, it is said that, inasmuch as an easement cannot be granted in reversion, therefore where a grantor is not in possession of the adjoining land no obligation can be imposed upon him with regard to interference with property granted, except upon the presumption or implication of a covenant by him not to interfere with the enjoyment. Then it is said that, if that be the true ground which imposes upon the grantor the obligation of non-interference, that cannot affect a purchaser without notice, inasmuch as the covenant would not run with the land, and the doctrine of Tulk v. Moxhay (3) would have to be relied upon. Now with regard, first of all, to the question of the right of air, cases have been cited shewing that a general right to air cannot be acquired by prescription, and it is suggested - and I think has been suggested in some of the cases - that even where a right to air has been enjoyed through a particular aperture in the house or other dominant tenement an easement with respect to air cannot be acquired. That seems to have been thought to be the case by Fry J. in the fairly recent case of Hall v. Lichfield Brewery Co. (4), in which he refers to the proposition of Littledale J. supporting his view. Now I think that the cases that I have referred to and the case of Aldin v. Latimer Clark, Muirhead & Co. (5) are authorities to the contrary, and I think, also, one must not lose sight of the observations of Lord Selborne in the case of Dalton v. Angus (6) in the House of Lords. It appears to me that in its result there is no distinction between the acquisition of a right to light and of a right to air. The measure of interference with light and with air which entitles the plaintiff to relief of course may differ."*[12]

---

10. Published by LexisNexis, edited by Lord Millett.

11. [1908] 1 Ch. 259

12. Inset references: (1) Moo. & M. 396; (2) 1 Dr. & Sm. 557; (3) (1848) 2 Ph. 774.; (4) 49 L. J. (Ch.) 655; (5) [1894] 2 Ch. 437. (6) 6 App. Cas. 794.

22. In our view, taking into account the growing public awareness and the increasing possibility of the existence of incumbrances relating to environmental matters, particularly in relation to newer properties, it will be of growing importance for vendors to consider the possibility of incumbrances over land connected with air-pollution in the same way as covenants routinely concern noise or light pollution and make disclosures about their effect on title.

Misrepresentation and Breach of Contract

23. A claim will fall outside the general principle of disclosure of *caveat emptor* where there is an actual misrepresentation[13]. It is more common to claim misrepresentation than to claim, for example, that a representation amounted to a breach of an express term like clause 7 described above. Where, however, the vendor had decided to include a warranty as to local air-pollution levels in the special conditions of sale, that would provide an obvious basis for a claim in the case of breach.

24. In order to claim damages or other remedies for misrepresentation, a purchaser would need to establish that there had been a false statement of material fact[14] made by or on behalf of the vendor[15] to the purchaser, which was intended to induce[16] and did induce[17] the purchaser to enter into the contract.

25. By way of example, an assertion by the vendor of land to a purchaser who has asthma that "*the property benefits from the cleanest air in the world*" may be actionable if that proves to be false, however, representations may still amount to misrepresentations even if they are not express; – numerous examples exist of misrepresentation by conduct[18], concealment[19], and partial disclosure[20].

26. In *South Western General Property Co v Marton*[21]*,* for example, a vendor had described a property in an auction catalogue as "*long leasehold building land*" and the catalogue went on to state that planning permission had been refused some years earlier because "*the proposed building was out of character with existing development in the area*". The planning authority had in fact stated that it was "*unlikely that favourable consideration would be given to any future application for a dwelling on the site*". The vendors denied misrepresentation and relied on a disclaimer in the catalogue, seeking to exclude liability for misrepresentations. The court held that the representations were false, albeit they had been made innocently, that the disclaimer was inoperative because of s.3 of the Misrepresentation Act 1967 and allowed the purchaser to rescind the contract for sale.

---

13. *Chitty on Contracts,* 33nd Edition at 7-175

14. *Chitty* at 7-006.

15. Ibid at 7-025.

16. Ibid at 7-032.

17. Ibid at 7-036.

18. *Spice Girls Ltd v Aprilia World Service* BV [2002] EWCA Civ 15 where it was held that the pop group had made an implied misrepresentation when they continued with to publicise products knowing that a member og the group was shortly going to leave, causing loss to the defendant

19. *Baglehole v Walters* (1811) 3 Camp. 154, where planks were nailed down to conceal rotting parts of a ship.

20. *Goldsmith v Rodger* [1962] 2 Lloyd's Rep. 249, where the purchaser of yacht was told that it had rot in its keel, which was held by the Court of Appeal to imply that the vendor had actually inspected the keel, whether or not it did have rot in it.

21. [1982] 2 E.G.L.R. 19

27. A more recent example not directly relating to planning, boundaries or physical aspects of a property is the case of *Doe v Skegg* (unreported) 2006 W.L. 2929446 (also referred to in *Emmett & Farrand on Title,* at 1.053), a case decided in the Chancery Division on 20th October 2006 by HHJ Pelling concerning the sale of a property in circumstances where an anti-social neighbour had been setting off the security lights at the front of the property and leaving cigarette ends on the driveway. The vendor had answered "*no*" in response to a question on the property information form[22] then used by purchasers in response to whether there had been any disputes or complaints about neighbours. In fact the vendor had written a letter of complaint about the anti-social behaviour and the judge took the view that the answer "no" amounted to a fraudulent misrepresentation.

28. These matters are highly fact-specific. There is no case-law that we can find relating to misrepresentation based on the presence of air-pollution, but that does not mean that such a claim could not succeed based on the facts of a particular case. In our view, the following matters are of relevance to such a claim:-

    (a) whether any sale particulars produced by the agent amount to a representation that a particular property either benefits from clean air, or that it does not suffer from a problem with air-pollution;

    (b) whether the vendors have been involved in any complaints, or litigation relating to air-pollution which they have failed to disclose when asked;

    (c) whether air-pollution in the area is serious and has been a material problem;

    (d) whether the local authority or other public bodies have been involved due to local air-pollution problems;

    (e) whether anything has been said by the vendors or their agents during viewing of the property which could amount to a misrepresentation regarding the quality of the air;

    (f) whether the purchasers have received, either by correspondence, verbally or by way of the property information form TA6, answers to questions which are inaccurate or wrong and therefore amount to a misrepresentation;

    (g) whether the purchasers' circumstances render them likely to make decisions as to which property to purchase based on air-quality, for example, those with breathing difficulties or other illnesses.

29. In general terms, our view is that as the problem of air-pollution becomes more widely-appreciated then, like the presence of Radon and Japanese Knotweed which are now explicitly included as questions within form TA6, the scope for misrepresentation claims may well increase. It is therefore likely to be important for purchasers to make suitable enquiries regarding air-pollution and for vendors to consider carefully their responses in order to avoid being subject to claims for misrepresentation or breach of contract.

---

22. The current version of the property information form TA6 is at https://www.lawsociety.org.uk/en/topics/property/updated-property-information-form-ta6-and-guidance-notes-published

E. DUTIES OF SOLICITORS

30. Solicitors and conveyancers have both contractual duties to their clients and a duty of care towards their clients. Many of those duties relate to more formal matters of title to the land being conveyed and the investigations and reports on title that solicitors undertake. They must act with care (avoid negligent mistakes) in completing conveyancing documents such as deeds of transfer or sale contracts. There are, however, wider duties which arguably have a bearing on conveyances of property where air-pollution is a material problem.

31. When acting for vendors, for example, solicitors' answers to enquiries raised by the purchaser are of particular importance; answers by a vendor's solicitor may give rise to liability of the solicitor to the vendor in negligence[23]. Clearly, it will be important for solicitors acting for vendors to give accurate answers to questions relating to local air-pollution levels. In our view vendors' solicitors would reduce the risk of liability by making reference to sources of empirical evidence on air-pollution in response to queries raised by purchasers.

32. When acting for purchasers, solicitors currently have the benefit that standard form TA6 does not include reference to air-pollution, although it does refer specifically to other environmental matters. A failure to follow such standardised forms and guidance renders a solicitor at greater risk of being found negligent in the case of an error[24]. Conversely, it would in our view be difficult to argue that a solicitor were negligent if he or she had followed standard practices by complying with the requirements of raising questions using form TA6. It should be noted, however, that the explanatory notes to form TA6 make reference to the provision of information otherwise than that requested by form TA6 and it would be unsafe to assume that solicitors are protected from liability solely by using the form in all circumstances. There may very well be circumstances in which, owing to specific circumstances known by the solicitor, advice should be given to a purchaser, or specific questions should be asked of the vendor.

33. Per para. 11-212 of *Jackson & Powell,* solicitors' duties may extend more widely than strictly to conveyancing matters, for example, where it is obvious that a client is purchasing a public house, a solicitor will need to make additional enquiries as to the nature of the liquor licence[25], and when acting for an inexperienced client in the purchase of restaurant premises there may[26] be an obligation to advise the client to consult the food hygiene authorities.

34. In our view, if there are specific facts communicated to the solicitor or known to the solicitor about their client to which local air-pollution is of relevance, such as health conditions as in the case of Ella Kissi-Debrah, it is arguable that the solicitor will be under a duty either to advise the client as to any material issues regarding local air-pollution, to obtain relevant reports on air-pollution, or to raise questions of the vendor.

---

23. *Jackson & Powell on Professional Liability,* 8th Ed. at 11-210.

24. *Reeves v Thrings & Long* [1996] P.N.L.R. 265 CA.

25. *Kelly v Finbarr J Crowley* [1985] I.R. 212, Murphy J.

26. As in *Kelleher v O'Connor* [2010] IEHC 313; [2011] P.N.L.R. 3 *Irish High Court*.

35. The Law Society's Conveyancing Handbook recommends that advice should be given to a purchaser on the reasons for having a survey undertaken and the limitations of a home condition report. As that forms part of standard conveyancing practice it is likely that a failure to do so will be held to be negligent.

36. Similarly, in our view, it is strongly arguable that solicitors are under a duty to advise their clients to seek, either as part of a comprehensive homebuyers' report, or in a separate document, advice from a surveyor relating to environmental matters relevant to the property being purchased.

37. It is also important to note that solicitors may be under a duty to the mortgagee in cases where they are instructed in the purchase of property not only to act for the borrower but also to act for the lender. In those circumstances, the Council of Mortgage Lenders' Handbook, now the UK Finance Mortgage Lenders' Handbook for Conveyancers[27] provides standard instructions to solicitors depending on the mortgage lender being represented:

LOGIN TO LENDERS' HANDBOOK

The UK Finance lenders' handbook provides comprehensive instructions for conveyancers acting on behalf of lenders in residential conveyancing transactions. There is a UK Finance lenders' handbook for each legal jurisdiction in the UK and all have a part 1 (general instructions) and part 2 (lender specific instructions). Use the search below to select a region and/or a lender's part 2 response.

The handbook for England & Wales also includes a part 3 which sets out standard instructions to be used where a conveyancer is representing the lender but not the borrower. Part 3 should be read in conjunction with parts 1 and 2. An example requirements letter to the borrower's conveyancer has also been developed for use in these circumstances.

The Handbook is voluntary for lenders and not all choose to use it. If they are not listed then you should contact them direct for instructions.

If you have any queries about the Handbook please view the FAQs section.

See our Summary of amendments for previous versions of the part 1.

27. Available at https://lendershandbook.ukfinance.org.uk/lenders-handbook/

38. Question 5.4.4. of the handbook[28] sets out the instructions of various mortgage lenders as to whether they require an environmental or contaminated land report to be obtained. The mortgagee's concern is primarily the value of their security and these instructions are aimed at discovering matters which could affect that value. Many of the lenders simply answer "*no*" to that question, but it is notable that some provide detailed instructions in that regard, and some simply answer "*yes*":

Habito	No
Halifax	No
Halifax Loans Ltd	No
Hampden & Co. plc	Yes
Handelsbanken	Yes, but only if the reports indicate matters requiring further investigation or if the content is likely to affect the security.
Harpenden Building Society	Yes, if available.
Hinckley and Rugby Building Society	We would only wish to receive an Environmental or Contaminated Land Report if there is an adverse contaminated land entry revealed in the local authority search.

39. HSBC UK Bank plc has very detailed requirements for environmental reports regarding Japanese Knotweed:

HSBC UK Bank plc	Japanese Knotweed - You will need to advise the Bank if you become aware that there is, may be or has previously been Japanese Knotweed identified on or near the property. Where Japanese Knotweed has not been identified within the boundaries of the property to be mortgaged to HSBC, but is present on neighbouring land over 7 metres from the boundary, we will rely on the Valuer to advise whether the property is suitable security. Where Japanese Knotweed has been identified within the boundaries of the property being mortgaged to HSBC or on neighbouring land within 7 metres of the boundary, but is more than 7 metres from the habitable space being used as security, we can only proceed if any damage to outbuildings, paths and fences is minor. We will rely on the Valuer to confirm whether a Japanese Knotweed Survey is required and will require the following: • A fully paid up Treatment plan which has commenced with an appropriately qualified person or company such as an accredited member of an industry recognised trade association such as the Property Care Association and the Invasive Non-Native Specialists Association • A minimum 10 year insurance backed guarantee can be provided on completion of the works. Where Japanese Knotweed has been identified within 7 metres of a habitable space at the property (either within the boundary of the property being mortgaged to HSBC or on neighbouring land) and/or the Japanese Knotweed has caused serious damage to outbuildings, paths and boundary walls, a Japanese Knotweed Survey is required in addition to the following: • A Treatment plan which has been fully completed by an appropriately qualified person or company such as an accredited member of an industry recognised trade association such as the Property Care Association and the Invasive Non-Native Specialists Association • A Completion Certificate that confirms the weed has already been fully remediated with a minimum 10 year insurance backed guarantee in place All documents relating to Japanese Knotweed will be provided to the Valuer for their confirmation that the property is suitable for mortgage security and whether there is any impact on the valuation of the property.

28. https://lendershandbook.ukfinance.org.uk/lenders-handbook/englandandwales/question-list/1818/

40. Yorkshire Bank Home Loans Ltd. requires notification of any environmental issue that comes to the conveyancer's attention:

TSB Bank plc)	
Yorkshire Bank Home Loans Ltd	No,but you should draw our attention to any environmental issue that comes to your attention.
Yorkshire	No

41. It is conceivable that particularly high levels of local air-pollution could affect the value of a property being sold. In that context, it might well be that a failure to investigate that possibility could leave a solicitor open to a negligence claim by a lender in the event that the mortgaged property is in negative equity in part because of pollution levels affecting its saleability.

F. Duties of Surveyors

42. One of the most common allegations against a surveyor is for breach of a duty to warn of a particular risk. Whether that failure is actionable will depend upon whether it was in breach of the surveyor's duty to carry out his or her duties with the care and skill to be expected of a reasonable competent surveyor in that field. This will generally depend on consideration of common industry standards and guidance.

43. One of the many examples of cases on surveyors' negligence in reporting was in *Cross v David Martin and Mortimer*[29], where a surveyor carrying out an inspection for a RICS House Buyer's Report and Valuation reported on the method of construction of a loft conversion but failed to comment in sufficient detail on the consequences of that conversion, i.e. that the roof space might not be capable of supporting the load.

44. Of particular relevance to the content of similar reports on residential property is the *RICS Home Survey Standard*, 1st Edition, November 2019[30], produced as a RICS Professional Statement with the following purpose:

> ### RICS professional statements
>
> **Definition and scope**
>
> RICS professional statements set out the requirements of practice for RICS members and for firms that are regulated by RICS. A professional statement is a professional or personal standard for the purposes of *RICS Rules of Conduct*.
>
> **Mandatory vs good practice provisions**
>
> Sections within professional statements that use the word 'must' set mandatory professional, behavioural, competence and/or technical requirements, from which members must not depart.
>
> Sections within professional statements that use the word 'should' constitute areas of good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.
>
> **Application of these provisions in legal or disciplinary proceedings**
>
> In regulatory or disciplinary proceedings, RICS will take into account relevant professional statements in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional requirements into account.
>
> RICS recognises that there may be legislative requirements or regional, national or international standards that have precedence over an RICS professional statement.

---

29. [1989] 1 E.G.L.R. 154.

30. https://www.rics.org/uk/upholding-professional-standards/sector-standards/building-surveying/home-surveys/home-survey-standards/

45. Paragraph 1.2 of the professional statement defines its scope as follows:

> ## 1.2 Scope
>
> This professional statement covers condition-based residential surveys at all service levels – see appendix A. A residential property survey comprises an inspection, report and advice of the condition of residential property. The primary purpose of such surveys is to consider a property as a physical asset, although some additional matters should be included, such as:
>
> - environmental matters (for example, flooding, radon, former mining activity, neighbouring uses)
> - legal issues (for example guarantees, statutory approvals, rights of way and other easements) and
> - risks to the occupants.

46. Paragraph 4.5 of the professional statement provides that surveyors *must* describe in the report any safety risk to occupants of which they are aware. Para. 4.5 makes specific reference to those risks possibly changing over time and being based on current research and regulation:

> ## 4.5 Risks to occupants
>
> Although residential property surveys do not include a formal assessment of statutory health and safety risks (for example, a Housing Health and Safety Rating System), matters that an RICS member or regulated firm is aware of that present a safety risk to occupants **must** be described in the report. RICS members should consider concisely listing the risks in a separate section with appropriate cross-referencing to where they appear in the report.
>
> As these matters will reflect current research and regulation, they may change over time. An indicative list of safety hazards has been included in appendix E.
>
> The range of identified matters will be the same for each level of service; what will vary is the explanation:
>
> - A level one report will identify and list the risks and give no further explanation.
> - A level two report will identify and list the risks and explain the nature of these problems.
> - A level three report will do all this and explain how the client may resolve or reduce the risk.
>
> Where the service is for a buy to let, the RICS member should adjust the scope of the service so the client can be properly advised on statutory risks and hazards to health and safety of occupants.

47. The indicative, non-exhaustive, list referred to in Appendix E of the professional statement includes such matters as high Radon levels, the potential for carbon monoxide poisoning, overhead power lines and issues relating to electromagnetic fields.

48. In our view, if local pollution levels present a material risk to occupants, it is likely that surveyors will be under a duty to warn about that risk when producing reports, such that they may become liable in negligence to clients if they fail to do so. That is particularly so given that the provisions of paragraph 3.1 of the professional standard require that surveyors *must* be familiar with the type of property being inspected and the area in which it is situated. Para. 3.1 makes specific reference to

research by surveyors including information about the general environment and neighbourhood described in Appendix C:

Appendix C: Knowledge of general environmental issues in a locality

RICS members need to be familiar with the nature and complexity of the locality in which the subject property is situated. This includes general environmental issues where the information is freely available to the public (usually online). The nature, quality and accuracy of the data varies between suppliers and so RICS members should treat this information with care. Although the range and nature of these issues will change over time, the list currently includes:

- flooding (surface, river and sea)
- radon
- noise from transportation networks
- typical geological and soil conditions
- well-known but unique local and regional ground conditions
- landfill sites and relevant former industrial activities
- former mining activities
- future/proposed infrastructure schemes and proposals
- planning areas (e.g. conservation areas, areas of outstanding natural beauty and Article 4 direction)
- listed building status and
- general information about the site including exposure to wind and rain, risk of frost attack, and unique local features and characteristics that may affect the subject property.

This list is not prescriptive or exhaustive because relevant issues will vary based on location.

G. The Building Regulations

49. The UK Government produces "Approved Documents" to give guidance about compliance with the Building Regulations 2010, as explained within the *Domestic Ventilation Compliance Guide*[31]:

> ### 1.2 Requirements on air flow testing, commissioning and information provision
>
> In England and Wales, requirements for ventilation and energy efficiency are contained in Part F, *Ventilation*, and Part L, *Conservation of fuel and power*, of Schedule 1 to the Building Regulations. This guide provides appropriate guidance for the four types of ventilation system discussed in detail in Approved Document F. It is referenced by Approved Document F (ADF), Approved Document L1A (ADL1A), and Approved Document L1B (ADL1B) as providing guidance on meeting those requirements for ventilation systems.

50. *Approved Document F*[32] which refers to the recommendations in the *Domestic Ventilation Compliance Guide* sets out in sections 5 and 7 detailed ventilation requirements for new and existing dwellings.

51. The document also provides detailed guidance at Appendix D to mitigate the ingress of pollution in buildings in urban areas:

> **F1** MINIMISING INGRESS OF EXTERNAL POLLUTION INTO BUILDINGS IN URBAN AREAS
>
> Table D1 **Guidance on ventilation intake placement for minimising ingress of pollutants**

Pollutant source	Recommendation
Local static sources • Parking areas • Welding areas • Loading bays • Adjacent building exhausts • Stack discharges	• Ventilation intakes need to be placed away from the direct impact of short-range pollution sources, especially if the sources are within a few metres of the building. Some guidance is given in CIBSE TM21
Urban traffic	• Air intakes for buildings positioned directly adjacent to urban roads should be as high as possible and away from the direct influence of the source so as to minimise the ingress of traffic pollutants. There will be exceptions to this simple guide and these risks may need to be measured by modelling. In such cases, it is recommended that expert advice is sought • For buildings located one or two streets away, the placement of intakes is less critical

52. Not only will new buildings need to comply with the regulations but it is likely that the regulations will be of relevance to some of the contractual and professional duties set out above. In particular, form TA6 contains specific questions as to the vendor's knowledge of compliance with the regulations and where there is a breach of those regulations an inaccurate answer on form TA6 or related negligent advice by a solicitor or surveyor may form the basis for a claim.

---

31. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/456656/domestic_ventilation_compliance_guide_2010.pdf

32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468871/ADF_LOCKED.pdf

H. THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS

53. The Consumer Protection from Unfair Trading Regulations 2008 SI 1277/2008 ("the **Regulations**") concern misleading acts and omissions in relation to the sale of goods and services, including immovable property. In 2011, three years after they were brought into force, the Property Misdescriptions Act ("**PMA**") was repealed on the basis that the Regulations covered all necessary matters. In September 2012 the OfT (since replaced by the Competition and Markets Authority ("**CMA**")) published its guidance for Estate Agents on the application of the Regulations.[33]

54. The Regulations implement the Unfair Commercial Practices Directive 2005/29/EC ("the **Directive**").[34] They remain in force pursuant to s. 2 of the Withdrawal Act 2018 ("the **WA 2018**"). Pursuant to s.6 of the WA 2018 they are to be interpreted in accordance with EU law, including general principles of EU law, as it applied up until 'exit day', that is up until 31st December 2020– this is referred to as 'retained EU law'. However, the Court of Appeal and Supreme Court are not bound to do so.[35] All Courts may take into account post-exit EU case law/developed EU general principles but in so doing are bound by UK rules of precedent.

55. The enforcement authority in the UK is the local weights and measures authority (Local Trading Standards Authorities) and the CMA. The former are obliged to enforce the Regulations (reg. 19(1)), whilst the latter has a discretion whether to do so (reg. 19(1)(A)). Consumers also have a right of civil redress under Part 4A.[36] However, it is unlikely that the conditions for civil enforcement would be met by a house purchaser in relation to the seller's estate agent, the contract being between the seller and the agent. In any event, what is significant for the purposes of this advice is the obligation of estate agent obligations to comply with the law and the potential risk of enforcement action if they do not do so, whether by a public body or private individual, as well as reputational harm.

56. In this regard, the Regulations apply to sales of 'property' and therefore to estate agents and others involved as part of their 'trade' in such sales. This is clear from the definition of 'property' as including "*immoveable property*" (Article 2(c) and reg. 2(1)) and the definition of a 'trader' as a person "*acting for purposes relating to his trade, business, craft or profession*" (Article 2(b), also see reg. 2(1)). Accordingly, whilst the private seller is unlikely to be caught by the Regulations, estate agents and others involved in the sale (for example web-sites offering private sellers the possibility of selling directly without estate agents) are caught. This is clear from the definition of "commercial practice", which is "*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*" (Article 2(d) and reg. 2(1)).[37] The definition therefore covers

---

33. https://webarchive.nationalarchives.gov.uk/20130301183704/http://www.oft.gov.uk/shared_oft/estate-agents/OFT1364.pdf

34. Article 1 of the Directive contains the following concise summary of its purpose: "The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests."

35. See s.6 WA 2018 and regulations adopted pursuant to s. 6(5A): the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020

36. Part 4A of the Regulations (as amended by SI 2014/870, reg 3)

the advertising, marketing and promotion of property (online or otherwise), including anything said or done during property viewings.

57. This is confirmed by the 2012 OfT Guidance, which sets out in detail the obligations on estates agents and others in relation to the sale of property under the Regulations. As noted in that Guidance (now archived):

> *"[i]n the CPRs, 'consumer' goes beyond a client who pays for your services or someone who buys directly from you. It also includes: a prospective client, a prospective or an actual viewer, a potential buyer of your property (for example where you are selling homes you have built), someone who buys or seeks to buy from your client, and someone who sells property to you."*

58. Commercial practices are explained to be wide in scope and "[i]n relation to property" as including

> *"when, for example, you advertise your services, offer pre-agreement advice to a client, describe a property for sale, interact with potential buyers negotiate a sale or purchase, or handle a consumer's complaint about your conduct."*

59. In more detail, the Guidance notes that a commercial practice may include the agent's

> *"market appraisal, description of property for sale or the advice you give during negotiations [because these can] affect consumers' transactional decisions, for example:*
>
> *• a client's decision whether and on what terms to sign or renew an agreement with you, or their decision to end an agreement*
>
> *• a seller's decision whether to put their property up for sale or take it off the market, to accept or turn down an offer, or to complete on the sale or not*
>
> *• a buyer's decision whether to view an advertised property, or whether and on what terms to make an offer on a property, instruct a solicitor or licensed conveyancer, commission a survey, apply for a mortgage, or complete on the purchase.*

60. Commercial practices are 'unfair' where they affect or are likely to affect the transactional decision-making of the average consumer. Conduct will be 'unfair' if it (a) contravenes the requirements of professional diligence; and (b) materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product: Regulation 3(3).

61. Conduct is also 'unfair' if it involves a misleading act or omission that "*causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise*": Regulation 3(4), 5 and 6. A "transactional decision" is defined in reg 2(1) as follows:

> *"any decision taken by a consumer, whether it is to act or to refrain from acting, concerning-*

---

37. See Article 3 and Recital 6 of the Directive; and European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (September 2016) 1666, p 14 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163 and *Warwickshire CC v Halfords Autocentres Ltd* [2018] EWHC 3007 (Admin).

> *(a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or*
>
> *(b) whether, how and on what terms to exercise a contractual right in relation to a product."*

62. Thus, "transactional decision" potentially covers misleading actions or omissions, which lead to something less than the actual purchase of the property, for example a potential purchaser deciding to instruct a solicitor in relation to the purchase of a specific property– or even deciding to visit the property.

63. "Misleading omissions" are defined in reg. 6 as follows (emphasis added):

> ***6.— Misleading omissions***
>
> *(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—*
>
> *(a) the commercial practice omits material information,*
>
> *(b) the commercial practice hides material information,*
>
> *(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or*
>
> *(d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,*
>
> *and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.*
>
> *(2) The matters referred to in paragraph (1) are—*
>
> *all the features and circumstances of the commercial practice.*
>
> *(3) in paragraph (1)"material information" means—*
>
> *(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and the information which the average consumer needs, according to the context, to take an informed transactional decision."*

64. As the European Commission guidance makes clear, Article 7(1) and (2) of the Directive (which is implemented by regulation 6 above)

> *"establish[es] in very general terms a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision".*[38]

---

38. See European Commission, *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices* (25 May 2016), section 3.4.1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163

Failure to set out information regarding air-pollution levels

65. There is in our view a strong argument that where an estate agent markets a property in an area with pollution levels that are so high as to involve a risk to human health, he or she would contravene Regulations 3(4) and 6 of the Regulations if he or she failed to inform prospective purchasers of the relevant pollution levels.

66. We consider this to be the case for the following reasons.

67. First, the duty in Regulations 3(3) and 6 is to provide consumers with 'material information' to enable the average consumer to take an 'informed' decision in relation to a transactional decision. In our view, high pollution levels that put human health at risk is 'material information'. The key to understanding "material information" in Regulation 6(3)(a) was considered by Briggs J (as he then was) in the High Court in *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch). He noted that the concept was closely connected to the concept of "need" within Regulations 5 and 6. Thus, whilst the Regulations do not require a standard as high as utmost good faith (which would require something close to full disclosure) (§74), the English law concept of "caveat emptor" had to be put on one side given the differences between systems of civil law and common law (§73).

68. Secondly, we do not consider that the definition of the "average consumer" as someone who is "reasonably well informed, reasonably observant and circumspect" (reg. 2(2))[39] affects our analysis, albeit that such an argument could be made. In *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76, Briggs LJ (with whom Richards and Ryder LJJ agreed) said (at §31) that the "critical question" was whether the average consumer (being reasonably well-informed, reasonably observant and circumspect) can be said to need the information from the trader in question, rather than obtain it elsewhere "*by shopping around, and finding out for himself*" in the marketplace.[40] This focused to a degree on the availability of the information, in other words, whether it was *only* available from the trader in question. However, it was made clear that the expectation that an average consumer will make their own enquiries was no more than a general assumption or starting point, since the context of the omission is important (§32). In that regard, an argument could be made that any reasonably circumspect purchaser who was interested or concerned about pollution levels would be able to find that information easily, such that omission of such information was not 'material'. Information on airpollution.org is freely available and not information which is only available to estate agents. We do not think this is a strong argument. Whilst information on air-pollution is publicly available, and this is arguably relevant context in determining whether the omission of such information is 'misleading', it is the fact that pollution levels are high and potentially a risk to human health that is particular information that can be said to be 'needed' by the purchaser, rather than general information on pollution.

69. Thirdly, it is strongly arguable that the absence of information on high pollution levels, which could potentially affect his health, would be likely to cause a consumer to take a transactional decision he would not otherwise take. For example, whether to visit the property, whether to make an offer for the property, the level at which to make such an offer and the final price accepted.

---

39. Also see Case C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung and Another* [1998] ECR I-4657.

40. Discussed at length at §§26 to 34 of the judgment.

70. In our view therefore, in deciding whether or not the pollution levels should be disclosed, the relevant question for the estate agent would be "*whether, [failure to disclose – seen in the context of all other representations] would probably cause the average consumer to take a transactional decision which he would not otherwise have taken*": *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch), §72) [41](emphasis added).

29 January 2021

JESSICA SIMOR QC
Matrix Chambers

NEIL FAWCETT
3 Paper Buildings

41. Note that this case was appealed to the Court of Appeal and referred to Luxembourg on other issues.